







**THE STATE  
AND  
GOVERNMENT**



# THE STATE AND GOVERNMENT

BY

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APPLICATIONS," "THE FAMILY IN ITS SOCIOLOGICAL  
ASPECTS," AND, CONJOINTLY WITH LESTER  
J. WARD, "A TEXT-BOOK OF SOCIOLOGY"



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## PREFACE

This work contains in generalized form a study of the development of the state, its sovereignty, and its differentiated governmental organization. It is based on a previous work of the author's, *The Development of the State*, which has been rewritten completely and enlarged by seven chapters.

There are, of course, many books that explain the governmental systems of leading states, supplying concrete information about particular countries. This work aims rather to show the development of government itself and the democratic movement in government, so as to furnish a general background for detailed studies of national governments. In pursuit of this aim the author has endeavored to indicate the socio-economic and intellectual factors that determine variations in government, in order that the reader or student may understand more clearly the significance of political institutions.

This succinct survey of government, as a sort of epitome of all government, may perhaps be found especially useful as an introduction to the study of political science and history in our colleges and universities. To this end copious references have been inserted, including a compact bibliography. In so brief a volume much detail has to be omitted, but it is chiefly matter that can readily be supplied by the instructor, who can also expand the text at pleasure by furnishing additional illustrations from governmental systems.

**PREFACE**

It is the author's hope that this volume may assist in making clear the relation of the state and government, so as to aid in developing that political intelligence without which no nation can make progress. In this era of world war, international politics, and national readjustments, a generalized view of political development may help towards a better comprehension of changing political situations and towards the possibility of a governmental policy based on scientific knowledge.

**J. Q. DEALEY**

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**PART I**

**DEFINITIONS AND DEVELOPMENT  
OF  
GOVERNMENT**



# THE STATE AND GOVERNMENT

## CHAPTER I

### GOVERNMENT AND THE STATE

**Government as Leadership.**—The word government is Greek in origin and has the meaning of steering or guiding. In this natural sense government may be predicated of many animal groups, which have their leaders who guide and direct the activities of the group members. Among the ape groups, our nearest kin in the animal world, there is a leadership based apparently on age and strength. Doubtless over primitive human groups in the countless centuries of the pre-neolithic period, there were leaders who guided their bands because of their skill and strength, or the experience they had acquired through age. To some it may resemble government by force, but it is force acquiesced in because of its utility in group safety. Government as guidance and leadership is world-wide and is common in every field of human activity, as illustrated in the government of family and church, in business and education, and in the innumerable associations of social life.

**Social Government.**—Every kind of government also has its law, its rules, its commands, and these are enforced by some well-understood authority such as parent, teacher, priest, or employer. Even the rules of etiquette are en-

forced through the pressure of public opinion and the dread of social ostracism from social leaders as a punishment for offenses against the code. It is perfectly correct, therefore, to assert that in primitive life there was government with its rules, its sanctions, and its enforcing authority. If the numerous population-groups of the world were living peacefully one with the other, knowing nothing of such notions as state, sovereignty, or politics, there would still be government, law, social control, and enforcement, but human beings would be thought of as living in society under social relations, and group life would be characterized as anarchic or anarchistic. These words in anarchistic theory properly imply the absence of political, militaristic, compulsory authority and always assume a peaceful social life. Each group, institution, or industry would be its own lawmaker, executive, and judge, under the guiding pressure of public opinion, quite after the system proposed by the Syndicalists of France or the advocates of sovietism in Russia.<sup>1</sup> These modern panaceas, therefore, are not new but are revised versions of primitive forms of government, lacking the state and its sovereignty.

**The War Band.**—The state<sup>2</sup> proper traces its ancestry back to the war band of primitive civilization. It presupposes not a condition of primitive peace, a sort of golden age, but a situation in which war is ever imminent and against which precaution must be taken. The war band presumably had its beginnings in the hunting and fishing

<sup>1</sup> A high-school or college class organization illustrates this form of government. There is a body of officers, having the usual governmental functions, and the class members with powers of law-making and taxation, but there is no method, for example, whereby members can be compelled to pay taxes by threat of forced sale of property.

<sup>2</sup> A word taken from the Latin phrase, "*Status rei publicae.*"

stage of civilization, when population began to press heavily on the supplies of natural foods and the competition for favored hunting grounds had developed. Attack and defense were doubtless sporadic at first and the war organization must have been of the spontaneous sort. But wherever competition became keen, skill in warring became a necessity for survival, so that systematic preparation for war became an essential in time of peace.<sup>8</sup>

The war band's reason for existence was the group need for protection—protection of life, protection of hunting grounds, and later also protection of property. This protection was against external foes only, domestic peace was preserved after customary methods under the supervision of the group elders. Group protection against external aggression was so essential that the war band naturally had a free hand given to it in the formulation of methods and in the requisitions it might impose. Religion gave it support, the fighting strength of the group was at its command, economic agencies might be subordinated in case of necessity, and even ancient custom was not allowed to interfere with the exigencies of the situation. War, indeed, has always proved to be a powerful agency in smashing obsolescent customs which repress social innovations. Under the steady pressure of war emergencies originated of necessity a theory of the sovereignty of the state. The war band in comparison with other organizations and institutions, the economic or hunting band, for example, or religion and family, came to be considered as supreme. In the piping times of peace, to be sure, its claims to dominance might be ignored by these rival organizations, any one of which might assert its pre-

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<sup>8</sup> The war dance of savage peoples is a primitive form of military training.

éminence, but when war or the expectation of war became habitual so that the "doors of the temple of Janus" were seldom closed, the war band became preëminent and all interests perforce were subordinated to the supreme interest of group safety. Even in these modern days admittedly the prime duty of the state is war, and preparations for it by common consent are made in times of peace as a matter of duty. The state, to be sure, has many other functions, but the supreme function is the necessity of safeguarding and furthering public interests through war, whenever diplomacy fails to ward off threatened danger from rival states.

The world is still on a war basis and national rivalries and struggles for larger "places in the sun" seem to imply that wars will be inevitable for many generations yet. International agreements and arbitration may do much to ward off too frequent wars, but civilization is too immature as yet to be able to harmonize human differences in an amicable fashion.

There is another important aspect of the primitive war band that necessitates explanation. Naturally every war involves an attack and a defense and the usual outcome is victory for one and defeat for the other. Defeat in ancient times meant extermination of population and the seizure of the possessions of the conquered. In later centuries a partial slaughter of the vanquished was accompanied by the enslavement of the survivors or the compulsory payment by them of exacted tribute. This added another function to the duties of the war organization. The victors as overlords, or masters, must keep submissive the mass of subjugated population under their authority. In other words, it must maintain domestic peace by suppressing riots and insurrections, and by compelling

the defeated population to labor, or to pay tribute according to dictated terms, and to obey the commands placed upon them by the ruling class.

**The State Supreme.**—In the light of these two explanations the state stands forth as fundamentally a war band charged with the duty (1) of preserving group safety and (2) of guaranteeing domestic peace by using threat and force so as to render submissive recalcitrant subjects. The state, therefore, differs from other social organizations in that it governs, not merely its own institution, the armed forces, but more than that it is a supergovernment over all other governments within the national group, whether economic, familial, or religious, and sees to it that the population as a whole is subject and obedient to the will and command of the rulers or ruling class.

On the basis of this explanation it now becomes possible to see the historic importance of the state, to recognize it as the dominant social institution and from the standpoint of group safety as the most important of all human organizations. It has been and is a mighty factor in civilization. Though in history it has frequently been the instrument of tyranny and despotism, and has often hindered rather than helped humanity, yet it admittedly stands for the preservation of the highest in human development.

Submission to its orders, as Hobbes<sup>4</sup> plainly showed, is the price men pay for liberty. For at least twenty-five hundred years the study of this institution has occupied the minds of the wisest philosophers and most thoughtful statesmen, and ancient writings even yet supply the basis

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<sup>4</sup>In his *Leviathan*.

for modern political studies.<sup>5</sup> We are, at the present time, at the close of the greatest war in history, in an era of numerous important developments in political life; expansion, colonization, federation, democracy, and struggles for the realization of statehood on the part of suppressed nationalities are so powerfully affecting the political conditions of the world that the study of the science of the state has become especially important. The United States of America, which, as a leading state, should have an important part in the discussion and formulation of world policies has an especial interest in world politics at present and should popularize the teachings of politics as never before. Naturally so much attention has been given to the state in late centuries that teachings in respect to it and its government have been systematized into a science, the study of the state, or political science.

**Political Science.**—*Political science* may properly be considered a branch of the larger study known as social science, or sociology. Social science devotes itself to the study of associated man, either by seeking to ascertain the principles and laws underlying human activity or by concrete studies of various forms of social life. The phenomena of social life are closely related and interdependent, but, for convenience, they are regularly classified into groups, and each class or group of phenomena made the subject of special study. In this way are developed such social studies as economics, political science, ethics, comparative religion, education, and history. *Political science* may be defined as the science concerned with the study of the state and of the conditions essential to its existence and development. In other words, the fields of

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<sup>5</sup> For example, Aristotle's *Politics* in the West and Confucian teachings in China.

political science should include a study of the origin of the state, its nature, its numerous forms of organization, its aims, powers, methods of activity, and the conditions that aid or retard its development.

So important is this study that every member in a state, and surely every citizen in a democracy, should strive to become familiar in a general way with the beginnings and the development or history of so important an institution, having under its control, as it does, the lives and property of citizens and the safeguarding of national destiny. The great empires of Russia and Germany, so powerful in 1914, so humbled in 1920, show clearly how necessary it is that states in making their decisions be guided by a broad political intelligence and by an insight into world situations.

A really wise statesman should be more than a skilled politician or a provincial nationalist. As Aristotle says,<sup>6</sup> he should be acquainted with what is best in theory as well as with what is best under given conditions. He should know the history, development, and purpose of the state, and the best theoretical and the best practicable forms of government. He should also be able, because of his large knowledge of governmental agencies in different parts of the world, to suggest remedies for defects in existing governmental systems.

**Subdivisions of Political Science.**—The subdivisions of political science are numerous and the boundaries of each ill defined. There are in consequence many possible classifications, each determined by the standpoint of the particular writer.<sup>7</sup> The classification outlined in the fol-

<sup>6</sup> *Politics*, Book IV, Sec. 1.

<sup>7</sup> As illustrations of classifications, see Willoughby, *Nature of the State*, pp. 4-5, and Pollock, *Introduction to the History of the Science of Politics*, pp. 94-95.

lowing paragraphs includes eight of the more familiar aspects of the science.

(1) If the state be viewed abstractly, we have the branch known as *political philosophy* or *theory*, devoting itself to reasonable explanations of the principles underlying political life and development. Such explanations obviously should take into account the kindred teachings of mental and social philosophies, which naturally consider political philosophizing in connection with their broader studies. (2) As in the case of other philosophies there may also be a *history of political theories*,<sup>8</sup> so as to give one an historic background for modern theories. This branch is rightly receiving increasing attention at the present time. (3) Again states have dealings and relationships one with another and have developed a code of *international law* and the art of *diplomacy*, both of which branches are of extreme importance in these days of world problems and complex interests. The indications are that such studies will be vigorously emphasized throughout this century, since states will need increasingly intelligent guidance during the international turmoils of the readjustment period on which the world is entering.

(4) A fourth branch of political science devotes itself to *political government*, studying its development, the conditions that aid or retard national prosperity, and the numerous forms of governmental organization and administration throughout the world. A study of this sort may be made general and comparative, or may restrict itself to the particular type employed by one's own government. The broader study is preferable so as to avoid

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<sup>8</sup>Dunning's three-volume work on *Political Theories* is an excellent study of this sort.

provincialism and the development of beliefs in the perfection of one's own form of government. (5) Again, attention may be given to the *functions* or *activities* of government, the theory underlying these explained<sup>9</sup> and the practices of typical governments worked out historically or comparatively. (6) A more highly specialized branch of political science is the study of *jurisprudence* or law in all of its branches (including international law). This has a close relation to ethics and the study of human customs (*mores*), since law is largely based on customs (the common law) and on supposed principles of right and justice (equity).

(7) There is also the study of the *art of politics*, that is, of the approved and honorable methods of conducting the affairs of government so as to secure national safety and general welfare. The word politics is frequently used also in a narrower sense, referring to the conduct of contests of political parties for office, or in the sense of dishonest methods aiming to secure political success through trickery or bribery. (8) Finally, there may be a study of *policy*, in which one studies the principles underlying governmental action with reference to some well defined aim or plan. A national policy may have in mind a broad principle of permanent importance, such as Great Britain's policy of the control of the seas, or the policy of isolation from European affairs, emphasized so strongly by the United States of America down to 1916; or, by contrast, policy may emphasize a narrower principle, applicable to a particular nation or condition, such as the American policy formulated by John Hay of the "open door" as applying to China. Each of these general topics is itself susceptible of

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\* Whether individualistic or socialistic, for example.

numerous subdivisions, but a complete and exhaustive classification falls more properly under political theory, and is not demanded by this study. Enough has been said, however, to call attention to the scope and importance of political science and to indicate, briefly, its general divisions.

## CHAPTER II

### THE SOCIAL BACKGROUND OF THE STATE<sup>1</sup>

Primitive human beings, as they slowly emerged from the harsh conditions of an animal struggle for existence, were banded together into natural groups, or *hordes*. These, through the friction of mind on mind and through coöperative action, enabled their members to attain greater mental ability and the power to satisfy their slowly increasing needs. One may safely assume that these natural human groupings were merely developments of animal aggregations and were based fundamentally on the need for foods, for safety against enemies, and for the propagation of the race. The permanent activities arising from these needs in due time evolved into the great primary institutions of human society—the economic, the political, and the familial.

**Social Institutions.**—Through the group life of primitive human beings and the consequent necessity for the expression of their inchoate thoughts, language developed and through its aid progress became possible, since a knowledge of beliefs, customs, and experiences could be transmitted from one generation to another—the beginnings of formal education. Through language also they could discuss one with the other their dread of the uncomprehended mys-

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<sup>1</sup> In the Bibliography, Section I, will be found references to some writers in sociology.

teries and dangers by which they were surrounded, such as the dream, the storm, and the lightning flash, and thus they reached conclusions as to the existence of an environing world of anthropomorphic spirits, or ghosts, whose good will must be secured or against whose malevolence safeguards must be devised.

Through the daily experiences of countless generations they also learned the best methods for securing group safety, and reached conclusions as to what customs should meet with social approval, and what actions were inimical to group welfare. These "folkways"<sup>2</sup> in due time became the *mores* of social groups, differentiating slowly into ethical ideals of justice and right and into the commandments for average morals and the custom law of early government, the source and parent of the many aspects of law covered by the modern science of jurisprudence.

During the long course of the social development briefly outlined above, aided by the rise of social institutions, human beings became adjusted to coöperative activities one with another, and out of these associations arose innumerable social relationships each aiding to cement more closely human intercourse, thereby strengthening social ties and a recognition of common interests. Through such associations and institutions are conserved the contributions of bygone ages to civilization without a knowledge of which social life would lack continuity and stability. Such knowledge, likewise, makes possible new attainments on the basis of the known, so that each generation has for its task the duty of comprehending the achievements of the past and of adding its own increment to human knowledge.

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<sup>2</sup> See Wm. G. Sumner, *Folkways*.

Obviously in a socialized education the members of society should become familiar with the development and importance of each of our great social institutions and should recognize the unity of social life. Every important modification in it affects all aspects of that life, its varied experiences are part of a common experience, and the same conditions and causes affect alike in varying degree all social institutions. In this century, therefore, when fundamental changes are taking place in social and national organizations, a knowledge of the development of civilization as a whole becomes important. This study is one of the branches of sociology, and is an attractive department of modern knowledge. In order, therefore, to see the relative place and importance of the state in social life, it may be well to indicate briefly the broad periods of civilization through which society has passed.

**Meaning of Civilization.**—Civilization has been defined in many different ways, but practically all definitions are based on one or more of three points of view: (1) that man is determined by his heredity and by his physical and social environment; (2) that in the struggle for survival, through variation and mutation he has attained a mental superiority over other animals; and (3) that this mentality, seen at its best in reasoning, generalizing, and in creative imagination, has been applied to the comprehension and utilization of the materials and forces of nature about him and to creative cultural achievements such as those in philosophy and art. A highly civilized race, therefore, should have a great measure of control over natural conditions, high mentality, artistic idealism, and philosophic insight. A race low in civilization would on the other hand be not

far removed in attainment and mentality from the higher forms of animal life.

**Its Earlier Stages.**—In tracing the development of civilization it is usual to divide it into stages, each characterized by some particular social attainment, either material or intellectual. Attention may, for instance, be directed to the substance used in the making of *tools*. The earliest human beings who became “tool-using animals” presumably used sticks and roots or branches of trees as primitive hammers and weapons.<sup>3</sup> At a later period pieces of heavy stone were fastened to wood either by thongs or by insertion. Still later these stones were polished so as to give a better cutting edge and a more ornamental appearance. Then came the age of bronze or copper, in which were used soft metals that could be beaten into shape while in their natural state. In the last stages of early civilization, when the use of fire was understood, iron came into use through smelting. This was followed in modern times by the Bessemer process for the production of steel and civilization was then ready for the massive machinery of the twentieth century, whose introduction depended also on scientific knowledge as to the utilization of the powers of steam and electricity.

Other writers prefer to trace civilization by noting the chief sources of *food supplies* for human beings. At first natural foods which could be obtained by man without tools or weapons were consumed. Then came, in addition, food supplies from hunting and fishing. Still later, through the domestication of animals, came permanent supplies of flesh foods, and then agriculture made

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<sup>3</sup> An excellent account of primitive man may be had from H. F. Osborn, *Men of the Old Stone Age*.

its important contribution toward the sustentation of the human race. Modern science, of course, through its knowledge of chemistry and plant and animal life, has vastly enlarged the quantity of foods and improved their quality. Since food-getting must always be the principal vocation of mankind one may associate with it the chief forms of occupation, such as the wild and precarious life of the hunter, the care of flocks and herds, the pursuit of agriculture, and finally the occupations involved in the trades, in commerce, manufacturing, and professional pursuits. The control or ownership of *land*, also, which is fundamental for food purposes, suggests a threefold classification; namely, (1) land in primitive times when the notion of the ownership of land and other forms of property was unknown; (2) that period in which land and other property<sup>4</sup> were considered as held or owned by the community as a whole; and (3) that in which land and other property are for the most part considered to be the personal possessions of individuals.

Still other writers prefer to trace civilization through the varying forms of the family and indicate a threefold development: (1) a metronymic stage, characterized fundamentally by kinship traced through the mother, and the absence of permanency in family life; (2) a patronymic, or patriarchal, stage in which kinship is traced through the male, and the power of the paternal head of the family tends to become absolute; (3) the modern stage in which kinship is traced through both parents and emphasis is placed on a permanent marriage relationship between one man and one woman.

Other writers would trace civilization by a study of

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<sup>4</sup> Except such personal possessions as weapons, tools, ornaments, and clothing.

the development of *religion* through its historic stages, such as animism, ancestor and nature worship, polytheism, monotheism, and pantheism. Others may trace it in the several stages of *morality*, starting from primitive notions of utility and its opposite, as shown in the customs of savages who stress a moral code made up mainly of tabus, or prohibitions, to later stages characterized by the growing freedom of individuals from excessive social regulation and control. Or one may, with Herbert Spencer, think of early civilization as dominated by the warrior and the priest and gradually passing from a militaristic towards an industrial stage emphasizing human industry and world peace.

It is hardly necessary to enumerate other explanations of development set forth by sociological writers. The very fact that the progress of civilization can be indicated under so many aspects shows that these are but specialized phases of one great movement of a unified social life, manifesting itself under many different forms, but all alike teaching that mankind is rising from primitive savagery to higher and more ethical, more intellectual stages of development. Even the most advanced peoples of modern centuries have not yet attained the highest possible development. The best of them are low and savage when compared with the ideals of social perfection taught by the noblest representatives of humanity in ages past and present. Further development is still possible, and every wise utilization of the materials and forces of nature and every upward step in intellectual and artistic attainment will aid in the furtherance of moral and social progress.

**Conditions That Affect Social Development.—**  
From the foregoing survey it may be seen that physical

and psychical conditions largely affect the development of social institutions, including that of government. So important are these influences that for the student of politics further explanation becomes necessary. One might note, first, the influence exerted on political development by the climate, by the fertility and mineral wealth of the soil, and by the contour and configuration of the land with its seacoasts, harbors, rivers, and lakes, so necessary for the promotion of domestic and foreign commerce. Consideration should then be given to the population, noting its numbers and its virility and physical stamina. In the third place should be studied the qualities of the mind, such as keenness of insight and the powers of mental perseverance and adaptability. A flexible type of mind, able to balance the old and the new, and to decide wisely under changing conditions, is a factor of prime importance in political development.

The chief points under these three topics may now briefly be indicated.

**I. Physical Factors.**—*Abundant Food Supplies Essential.*—Communal life, which is essential for political growth, develops only when abundant food supplies attract masses of population. Communities therefore first developed in fertile river valleys, on well watered plains with warm and equable climate, where game was plentiful, pasturage possible, and agriculture easily productive. These natural advantages, however, are not sufficient. There are other needs besides that of food. Even in primitive savagery there was a demand for hard woods, flint and jade, colored earths, clay, fibrous plants, and simple luxuries. Locations furnishing such supplies developed a rude system of barter with hordes less richly supplied. As civilization advanced, metals came to be

necessities, and mines were sought for in all directions. Explorers and traders established centers of commerce wherever mines were found. Great city states and empires rose one after the other, rising as they became the centers of trade between wealthy and populous regions, and falling as other and better regions were discovered or shorter and safer routes were developed. In this way rose and fell the empires of the East and the later civilization of Persia, Greece, and Rome, as the mining wealth of India, Arabia and Africa, Asia Minor, Southeast Europe, and the outlying countries fringing the Mediterranean were one after the other discovered and utilized.

*Expansion Through Commerce.*—The domestication of animals and the utility of some of them as beasts of burden developed the caravan and the long overland routes of Asia. Water transportation along the dangerous shores of southern and southwestern Asia lagged far behind, but when civilization reached the eastern shores of the Mediterranean, first, Crete and then Phœnicia, the earliest of sea powers, pushed northward through the Ægean Sea and westward to Italy, Phœnician sea merchants voyaging even as far as the Atlantic seeking metals, establishing colonies, and carrying with them the flourishing civilization of the East. After the Phœnicians came the Greeks, born colonists and keen traders, who, building on the contributions of ancient civilization, with versatile mind continually sought after "some new thing" and thereby developed the highest type of ancient civilization. After them came an empire of exploitation, a nation with a developed capacity for war, administration, order, and law, which conquered and absorbed one after another ancient civilizations and barbarian tribes, bring-

ing all under the common yoke of Rome. But it was a nation lacking insight, invention, and the scientific attitude of mind; it became ultra-conservative and failed through lack of adaptability; it knew in economics only exploitation and devastation; and with all its political experience and its capacity for law and administration, it failed to establish the state on sound economic foundations. The collapse of the Western Roman Empire drove civilization back to the East and to the South, where it flourished for nearly a thousand years longer, at Constantinople, in Persia, and in northern Africa. Western Europe barely held its own for five hundred years, but then came in the tenth century the discovery of metals in the Harz Mountains, the rise of German and Italian cities, and the Crusades. European civilization was greatly aided by the Crusades through the destruction of many turbulent robber barons, the revival of commerce with Egypt and the East, and the consequent inflow of the intellectual attainment and culture of Greek and Saracenic civilizations. The use of the compass opened new routes from China to the Red Sea and the knowledge of it rendered possible the discovery of America. This discovery, coupled with the Fall of Constantinople, transferred the trading center of Europe from Italy and the Rhine to western Europe, for the mineral wealth of Mexico and South America poured into its cities, and the great expansive movement westward in commerce and colonization gave new vigor and energy to its seafaring nations.

*Expansion Through Manufactures.*—When the era of steam began in the eighteenth century, first the demand for cotton and cotton goods, and then for modern machinery, gave England and the United States of

America their opportunity, through their possession of immense beds of coal and iron. To-day competing nations are searching the world for accessible stores of metal ores, fuels, oils, building stone, forests, and for fertile plains suited for grazing and agriculture. These are the first conditions for a nation's material prosperity. If other factors be then present, such as facilities in transportation, abundant and intelligent labor, open markets, and an energetic population, a basis exists on which may be built up a great and mighty civilization.

**II. The Factor of Population.**—In considering the effect of population upon political development it is obvious that, other things being equal, the numerical greatness of a people is a distinct advantage in competition, whether in war or for economic supremacy. The chief factor in determining the number of a population is the food supply. Among savage peoples, when population presses too closely on food supplies, the weakest are regularly put to death and perhaps consumed as food. From this necessity probably arose the customs of infanticide and the slaying or exposing of the aged or infirm. The custom of infanticide was practiced even by patriarchal peoples, as, for example, among the ancient Greeks and Romans, and to-day in China. Population is also reduced by the excessively high rate of infant mortality among uncivilized and semi-civilized peoples, and by wars, famines, and pestilences.

*The Standard of Living.*—Among civilized communities the standard of living plays an important part in determining the increase of population. The demands of social life are so numerous and expensive that the higher social classes tend to restrict the number of their offspring either by natural or unnatural means. The wisdom of

this "race suicide" is open to question from the stand-point of social and national development, but the entire matter is debatable. Presumably the "proletariat" also will reduce the size of their families when the rising standards of civilization affect them, resulting in a stationary population as in France, a situation fraught with danger when rival nations have larger birth rates.

A dense population is not really an advantage to a state unless the masses of the people have a sufficient and varied food supply, so as to develop strong physiques able to endure hardship and to resist disease. Under right conditions, at least in a competitive age, there develop in men masterful, manly, and aggressive qualities of mind. If population presses too closely on food supplies, the people, poorly fed, become physically inert, they are prone to disease and lack mental energy. Such persons, compelled to live from hand to mouth, become improvident and remain low in civilization and character, even though the wealthier classes of the community are comparatively high in civilization. This evil is seen at its worst in the tropics where the *per capita* amount of necessities is so small, and the fertility of the soil so great, that the land fairly swarms with millions, who barely exist in times of plenty and who die by the thousand in times of famine and pestilence through lack of physical vitality and through mental inertness.<sup>5</sup>

*Need of Economic Opportunity.*—The virility of a population also depends to some extent on the stimulus of economic opportunity and of the intellectual and social environment. Under favorable conditions human beings easily become economically and intellectually versatile,

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<sup>5</sup> In respect to this subject consult *First Conditions of Human Prosperity* by R. Russell.

but, when narrowed by the dreariness of a monotonous life and occupation, they lose ambition. On the other hand, a mind well trained by proper education and stimulating social influences, reacts on the body and quickens its activities. Freedom from anxiety also, due to the knowledge of a sufficient income and of the safeguards of well enforced law, is a powerful stimulus to physical energy along economic lines. When such conditions are favorable, there readily develops an energetic and aggressive spirit that brings to the front the explorers, merchants, inventors, and thinkers of the age. No one, to be sure, should assert that an inert peon of the tropics, by increase and variation in diet, would at once become an aggressive American; but, undoubtedly, several generations of the sustenance and training which Anglo-Saxons have had, would make the descendants of that peon much more forceful persons than their ancestor. Cæsar had a rather poor opinion of the fighting and staying capacity of our barbarian forefathers, but unquestionably Roosevelt's Rough Riders of the Spanish War would have a similar opinion of Cæsar's legions, if they should ever meet in combat on the Elysian fields.

**III. Mentality as a Factor.**—Brain capacity and mental development are most important considerations in estimating the worth of a population. A savage, like an animal, has no insight and but little imagination. He is savage in disposition only when ill fed or ill treated. Otherwise he is peaceable, good-natured, and indolent. Patriarchal life, holding as it did the mass of its population at hard labor, developed in them patient endurance and tireless industry, but no high mentality. That developed in the elders and masters, who, having much leisure, besides domineering, aggressive qualities, de-

veloped also mental acumen and philosophical insight, always characteristic of the higher classes of patriarchal systems. Commercial life by contrast demands aggressiveness, ingenuity, mental alertness, and ruthlessness in stamping out opposition. An age of production through machinery demands scientific insight, executive capacity, and the ability to master details. In the type of the dominant peoples of Western civilization we find a composite of these qualities. Civilized man is regularly ruthless and merciless to an opponent, but is not revengeful when opposition has ceased. He is guided by ideals when material interests are not involved, but is selfish and covetous at the possibility of gain. He is masterful in dealings with inferiors, resourceful when necessity arises, capable of patient toil and hardship, yet is fond of ease and relaxation. Energetic, keen-minded, inventive, and idealistic, yet relentless, avaricious, and domineering, he combines in himself the best and the worst of humanity. He is a savage becoming a god, and has shown great natural capacity in either direction.

## CHAPTER III

### THE DEVELOPMENT OF POLITICAL GOVERNMENT

**Four Periods of Development.**—With this outline of the development of civilization as a background, it will now be possible to consider at more length the several stages in the development of political government. These stages, it will be found, are closely associated with the conditions of economic life, and for that reason economic periods of development will form the best basis for an historical study. The periods chosen may be indicated briefly as follows :

I. The primitive period, based on the occupations of hunting and fishing, and lasting to the development of a pastoral and agricultural mode of existence;

II. The patriarchal period or period of settled social institutions, characterized by the definite occupations of grazing and farming, and by the growth of property rights;

III. The period of urban civilization, developed through the growth of commerce and international trade; and

IV. The period of industrial civilization emphasizing production through extensive use of machinery and developed power such as steam and electricity (*machinofacture*), by contrast with *manufacture* and the natural power of earlier stages, such as wind and flowing water.

In these last two stages the specialized occupations

incident to commerce and machinofactures supplement the fundamental occupations of the earlier periods. The first period, often referred to as the age of savagery, emphasized natural foods, the occupations of hunting and fishing, and the use of stone implements. The second period, the age of fixed, static, or patriarchal civilization, made use of flesh foods and grains, obtained through the occupations of pastoral and agricultural life, and made use of soft metals and, to some extent, of iron. The third period, the age of commerce and urban civilization, added to former occupations those involved in transportation and international trade, making also a large use of iron, and gaining food to some extent by exchange of manufactured goods for needed supplies. The fourth period, characterized by a complex and centralized social organization, emphasizes industrial occupations and abundant productivity through the utilization of the materials and forces of nature by means of machinery. Each later period includes what has gone before, but with diminishing emphasis. Hunting, for example, becomes a diversion more than an occupation, and foods from the soil are substituted for flesh as the "staff of life."

It must not be supposed that these periods are synchronous for all mankind. They represent grades of development and apply to particular racial and national groups of men, not to mankind as a whole. The larger half of humanity<sup>1</sup> is still in one or the other of the first two periods, chiefly in the second; some nations after passing into the third period have sunk back into the second;<sup>2</sup> the last period applies only to a numerically

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<sup>1</sup> Most of China, India, Russia, and Africa, for example.

<sup>2</sup> Asia Minor and Persia are illustrations of this change.

small part of humanity made up of those modern nations most advanced in science and invention.

### I. THE PRIMITIVE PERIOD

**The Early Condition of Man.**—In earlier primitive times human beings must have been little removed from the conditions of the beasts about them. They had no tools, no permanent marriage ties, few or no religious beliefs, nothing worthy of the name of state, and subsisted, like animals, on what nature spontaneously produced. In later primitive times, some knowledge of which is fairly well supplied from a study of relics and fossil implements, and from observation of low civilizations still existing, men had become far superior to the members of the animal world. They knew the use of fire, and had devised weapons, industrial and household implements, and the canoe. They erected rude houses, and made use of clothing, partly for protection against the inclemency of the weather but chiefly for purposes of ornamentation. Personal ornaments, rude drawings, idol or image-making, and the monotonous rhythm of their musical implements, dancing and singing, all testified to the beginnings of æsthetic development. The voice had been trained into articulate speech. The mysteries of religion were manifested in fetishistic and animistic beliefs under the guidance of the conjurer and the medicine man. The natural metronymic family of earlier times was still the dominating type, but was developing tendencies looking toward the patriarchal form. Personal property rights can hardly be said to have developed except that weapons, ornaments, and clothes were individual possessions. Ownership in land was unknown, except that each savage horde had hunt-

ing grounds beyond which its members went at their own peril. Such an age was plainly the age of beginnings. Men were no longer animals but neither had they much civilization.

Evidently in such a low stage of social life little should be expected along lines of political development. Yet the basis of practically all we have to-day may be traced back to the later primitive period. The nation was represented by the *horde*,<sup>3</sup> a loosely organized mass of human beings not necessarily closely akin, but yet held together by propinquity and by ties of common descent, customs, and language. The horde was not a permanent organization by any means, yet in normal times it held together for purposes of food-getting, for offense and defense, and for social or convivial gatherings. Long established customs tracing their descent from time immemorial, and prohibitions in the form of tabus represented early *law*, which was enforced by public opinion under the guidance of the elderly men of the horde, who, as persons of wide experience and larger knowledge of traditions, were deemed wise. This *body of elders* is the ancestor of modern government and from it has evolved the three historic departments of government. Intercourse between hordes was regulated by a fairly definite mode of procedure, the germ of *diplomacy* and *international law*.

**The Beginnings of the State.**—In these developments there surely seem to be the elements necessary for the existence of the state—authority, law, procedure,

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\* There is much diversity in respect to the terminology applied to the several forms of early human groups. To avoid confusion, therefore, the reader should carefully observe the idea conveyed in this text by the words *horde*, *tribe*, and *clan*, and should remember that the same groups are named differently by different writers.

and a unity organized for purposes of common utility and protection. Yet there was lacking the element of permanency, permanency in interests, in organization, and in purposes. For as long as a community depends entirely on hunting and fishing for a precarious subsistence, nothing really permanent in civilization can develop. In such a stage of life hordes of men and women moved about from place to place seeking food supplies. When food was abundant, the pleasures of feasting and companionship increased the membership of the horde. But when food became scarce, the horde lost its unity since its members scattered far and wide so as to maintain life more easily. Under such conditions there could be no permanent home, no opportunity for the steady development of law, order, discipline, and morality and no time for mental development except along lines of cunning competition with hostile beasts and savage men. Physical instincts, derived from animal ancestors, modified slightly by custom and the rule of force, and perpetuated by hard experience, were the chief factors in life. Continuity of purpose and forethought were unknown. Men lived from hand to mouth in a desperate struggle for existence, and by no possibility could develop what might properly be called a state. Yet the conditions were present that at a later stage allowed the elements of the state already in existence to develop into a definite body politic, exercising sovereign authority over a permanently settled community.

## II. THE PATRIARCHAL PERIOD

**The Development of the Tribe.**—Several factors contributed to the development of higher civilization among some of these primitive hordes. The demand for

food and safety compelled greater ingenuity in the manufacture of hunting weapons, as well as cunning and skill in the use of them against human enemies whose flesh in those days supplied a much-desired variety in daily food. Women developed patient endurance, medicinal knowledge, and inventive power, as they plied their tasks of rearing the young, gathering and preparing edible vegetation, weaving, house-building, and fashioning ornamentation. If the sharper mentality of a horde met its reward in the shape of more abundant food supplies, improvement in the physique furnished the conditions for the possibility of a still higher mental development. Some ingenious community at last hit on the happy expedient of saving alive the young of wild animals, domesticating them, and thus by the exercise of a little foresight and self-denial, it was enabled to keep food supplies on hand against times of scarcity. This discovery of human supremacy over animals susceptible of domestication, gave an immense impetus to civilization. Transient hordes became firmly compacted *tribes* held together by the common ownership and use of plentiful food supplies in the form of flocks and herds. The vague boundaries of hunting grounds became definite areas of excellent grazing lands fiercely defended against envious aliens. For the possession of flocks and herds meant war with hungry neighbors. Hence there came a demand for better weapons, wiser leaders, braver men, who as shepherd-warriors were prepared to defend their wealth against all comers. Such an aggressive mode of life developed masterful qualities in the men; women were relegated more and more to the inner life of the group, and with the increase of domestic responsibilities tended to become household drudges. The abundance of

flesh foods gradually banished cannibalism, especially when it was perceived that the enforced labor of a captured foe was of more utility than his body as food. Permanent food supplies, more leisure, and greater mental capacity gave opportunity for meditation, and as a result came clearer ideas in regard to human relationships and the supernatural. Crude animistic beliefs changed into theories of nature and hero divinities, preparing the way for later systems of nature and ancestor worship. The possession of permanent sources of wealth brought about social distinctions between the rich and the poor, the master and the slave, as property changed from communal to private ownership.

**Permanent Elements.**—Though many centuries probably elapsed in the transition from the old to the new, a period filled with curious blendings of primitive and patriarchal civilization, yet slowly but surely the higher civilization supplanted the lower. In place of the horde came the tribe; the growing importance of the male was marked by the semi-slavery of the women and the rise of the patriarchal family in place of the metronymic. Continuous wars brought about clear notions of leadership, authority, subordination, law, and tribal regulation. A more permanent communal life developed mental capacity, social institutions, wiser traditions, and greater ingenuity in the manufacture of tools, weapons, and household conveniences. All this had its influence on the developing state. There came a permanent tribal life, definite social institutions, clear-cut notions of authority and law, and a recognition of a tribal welfare, to be fought for and strengthened, even, if necessary, at the sacrifice of the well-being of individuals. In such conditions are to be found all the essentials of a state,

not so well defined as in modern times, but yet a state in its fundamental features.

**Agriculture.**—The patriarchal period attained its maturity with the development of agriculture. No one knows who first planted seed in the ground with the thought of ultimately reaping its product. Possibly the knowledge of seed-planting may have existed even in early primitive times, but certainly as long as men lived here to-day and there to-morrow such knowledge was of no practical use. No one would care to plant seed that another would almost certainly reap. But when communities came to have fairly well defined boundaries within which they might roam, and when in the pastoral period a diet so largely of flesh demanded some variation, chance experiments, natural appetite, a little reflection and forethought, probably all contributed to the development of a rude system of agriculture, merely to supplement the food supplies furnished by flocks and herds.

It should not be inferred, however, that agriculture always followed a pastoral life. Many hordes inhabited lands not suited to grazing and in such cases if they developed at all they passed directly into agriculture. The rise of agriculture, however, gave a great impetus to civilization. For as population increased men had to depend more and more on vegetation for food supplies. A community that relies chiefly on flocks and herds for food needs much more land than one that depends chiefly on agriculture.<sup>4</sup> As the competition for fertile grazing lands became keener with the growth of population, a community must either fight oftener and more vigorously

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<sup>4</sup> It is estimated that twenty acres of cultivated land would furnish a comfortable living for the average peasant family in Europe.

for sufficient land or else be satisfied with what it had and get food by farming. Fighting was probably much more attractive than working, but fortunately, perhaps, another alternative presented itself. The institution of slavery was rapidly developed. Aliens captured in war, weak and inferior neighbors, criminals, and debtors of the tribe were deprived of liberty and compelled to do the drudgery of farm labor; in this way they secured for their masters edible grains easily turned into nutritious food by the labor of the women. Slavery in modern times is a curse, but in earlier periods it was probably the principal agency whereby humanity passed from pastoral life into agricultural, and was thus the determining factor in the development of the chief source of modern food supplies. Selfish interests and experience soon added improved methods of farming and when tribes came to depend chiefly on the products of the soil for sustenance, the pastoral stage of their existence had passed into the age of agriculture.

**Changes in Tribal Organization.**—Well marked effects followed this important change. The tribe definitely broke up into *clans* composed of members closely united through ties of kinship and economic and religious interests. The character of these clans as they settled down into farming village communities became strongly patriarchal. The headship of the clan was vested in the oldest male of the leading family but tended to pass from father to son. Religion secured a powerful hold on the mind by emphasis on ancestral worship. The family became permanent and definite, but included a wider range of kin than the modern family. The entire clan was virtually one great family looking to the head as the patriarch, or ruling father, who guided and pro-

tected his children. They bore a common name, had a common system of worship, and cultivated their lands and pastured their herds in common. Their disputes were settled and their affairs regulated by the heads of households or elders in joint session under the leadership of their chief.

**The Village Community.**—In this system each village community was itself a petty state voicing its sovereignty through the chief of the clan who was assisted in his deliberations by the older and more influential men under his authority. This body unitedly declared the customs, adjudicated cases, and regulated the services of its members in peace or war. Such a community by intermarriage became closely kindred in blood and in social customs, and thus developed a homogeneous, autonomous, self-centered life that gave wonderful permanence to that form of organization. To this day the larger part of humanity live in agricultural village communities, practically stationary in their civilization and retaining customs and modes of thought having a history of many centuries.<sup>5</sup> Through such communities mankind became trained in manual labor, endurance of toil, reverence and respect for law and authority, tenacity in the maintenance of civil rights, and veneration for the supernatural. Without such training civilization could never have attained stability, nor would humanity have developed the homelier virtues and domestic tastes. Its conservatism, however, so necessary in a static civilization, becomes weakness in times of transition and broader development. If unable to adapt itself to newer conditions, such a community readily be-

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<sup>5</sup>For best examples of such, note studies of the village life of China, India, and Russia.

comes the prey of stronger, more aggressive communities and falls into a condition of subordination and servitude.

**Loose Confederations.**—The several village communities, which had once been parts of an original tribe, naturally maintained their connection one with another. This intercourse manifested itself in joint worship at stated times, and in marriage alliances, commercial dealings, and joint action for offense and defense in times of war. In this way developed loose *confederations* which in many cases became more strongly unified through peaceful alliance or through the superiority of a powerful community.<sup>6</sup> From such confederations, by constant social intercourse and intermarriage, aided by ties of kinship and religion, there might easily develop a *tribal monarchy* like that among the Israelites and the Homeric Greeks under Agamemnon. If the conditions that make for civilization were favorable, and able leaders were in charge, such tribal monarchies readily passed into still more unified kingdoms and empires, not strongly centralized as in modern times, but presenting that type so characteristic of *Oriental monarchies*, a sort of confederation or a feudal suzerainty, a unity made up of subordinate units, practically autonomous in local affairs, but yet tributary and in general matters under regulations ordained by the overlord or king.

In such communities as these, whether petty village states or loosely confederated monarchies, were all the necessary elements of the state. Law and authority were clearly in evidence; definiteness and permanency in or-

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<sup>6</sup>An excellent type of such a confederation among American Indians may be found in Morgan, *Ancient Society*. A variation in development may be noted in the early history of Rome with its confederation of thirty cities (villages).

ganization had been attained; there were well defined ideas of rights and obligations, and a fairly clear consciousness of political unity. They differed radically from modern states, however, in that a patriarchal community was a state, family, and church in one. These three institutions had not become differentiated in the minds of men. They were controlled by the same leaders and might be considered merely three aspects of the same thing, forming a kind of political trinity in unity. Under such conditions the jurisdiction of the state proper did not extend over the other two institutions, unless by a legal fiction it is assumed that "what the sovereign enforces he commands."<sup>7</sup> Toward the end of the patriarchal period the three became differentiated in thought and were looked on as coördinate, each exercising supremacy in its own sphere, and the three unitedly representing the supremacy of the entire community. In later years the state became aggressive through the influences brought about by commerce, and steadily began to encroach on the sphere of parental and ecclesiastical control.

### III. THE PERIOD OF URBAN CIVILIZATION

**The Influence of Commerce.**—A third stage of political life was ushered in through the development of commerce. Even in primitive times a system of barter and trade had developed among different hordes. A brisk traffic was carried on in the exchange of salt, food supplies, ornaments for the dress, paints for the body, and jade, flint, and metals for tools and weapons. Between centers producing such forms of wealth and popu-

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<sup>7</sup>For discussion of this point, see Willoughby, *Nature of the State*, p. 169.

lous centers in need of them, well beaten paths were made, the humble beginnings of the modern railroad. When wealth multiplied through flocks, herds, and agriculture, men's needs multiplied proportionately. Commerce kept pace with the demand. Beasts of burden were trained to the yoke, navigation developed, forms of money as a medium of exchange were devised, and the merchant definitely took his place in civilization. With commerce came the city,<sup>8</sup> that great agent in social development.

The reason for the rise of the city with commerce is obvious. Certain village communities found themselves established in the center of a mining district, or in the heart of fertile lands well suited for grazing or farming; others, again, at favorable spots on rivers, such as the mouth, a junction, or the head of navigation. As trade developed between mining and food centers having masses of population, resting places at regular intervals were established for the convenience of travelers. At all such centers the market place developed and trade was encouraged by the maintenance of peace and order. The termini of trade routes and the best locations between the termini grew into great centers of population. Here gathered the wealth and learning of the time. Here was to be found merchandise of all descriptions. From all parts of the known world came keen men of business, travelers of broad experience, well versed in foreign customs and ideas, and wise men eager to add to their knowledge. By constant social intercourse and by competition of ideas, the mentality of the population rapidly developed. Increase of wealth developed new

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\*The Greek πόλις (city) is our basal word for politics and its derivatives.

wants, higher learning, broader minds, and a more thorough organization of social institutions.

**Changes in Political Organization.**—Evidently such a social development demanded changes in political organization. The members of a conservative village community living in practically the same way as their fathers might well continue the customs and habits of their ancestors. But when the population and wealth of the community increased by leaps and bounds, when strangers of wealth and brain capacity settled in ever larger numbers within their borders, modifications had to be made.

The village lord gradually became a petty king, his little council became a great body of advisers and administrators, the petty business of the village became a mass of duties requiring the services of many hundreds. Then followed centralization of authority, codification of customs, and the introduction of business methods in administration through the organization of great departments of government. Increasingly larger numbers of influential residents, whether native or foreign by descent, shared in the responsibility of government. Such modifications brought about the development of the *city state*, best known through the classic examples of Greece, Rome, and the League of Hanse Cities, but found in all early civilizations characterized by a developed commercial life.

A city state, by war or more peaceful means, might extend its influence so as practically to control many smaller cities and large areas of farming, grazing, and mining lands. In this way developed another type of ancient monarchy, one much more strongly unified and centralized than tribal or feudal monarchies, because its

several parts, by more frequent intercourse and more vigorous mentality, attained a greater harmony of common interests and a consciousness of national unity. The short-lived empire of Alexander was a good illustration of this, but the best illustration of such a development is seen in the Roman Empire, which through war extended its boundaries in all directions and then bound together its discordant parts into a harmonious unity through ties of commercial interest, centralized provincial administration, and allegiance and submission to a common law and an imperial sovereignty.

**National States.**—The collapse of the Western Roman Empire was a retrograde step in civilization and plunged western Europe back into those stages of political life characterized by village communities and city states. The so-called feudal system represented the movement toward confederation. The rise of the feudalistic Holy Roman Empire, and of the centralized Papacy in its ambition for temporal authority, represented the movement toward the confederation and centralization of empires. The failure of both of these to realize their aims, coupled with the revival of commerce through the influence of the Crusades, the invention of the compass, and the discovery of America, caused the development of smaller empires or kingdoms, known usually as *national states*.<sup>9</sup> These nations were commercial in their tendencies, and each was strongly unified by definite communal interests, racial, religious, and economic. This unity of interests tends to result in a demand for political autonomy or independent statehood and is usually discussed in political theorizing as the

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\*For example, France, Spain, England, and the Netherlands.

*principle of nationality.*<sup>10</sup> The formation of national states started once again a forward movement in civilization after a thousand years of seeming inactivity, during which the barbarians of the West were slowly veneering themselves with the polish and civilization of Judea, Greece, and Rome. The movements of recent times toward world empire are best illustrated by the Napoleonic period in France, by the former policies of imperialistic Russia and Germany, and by the expanding Empire of Great Britain.

#### IV. THE PERIOD OF INDUSTRIAL CIVILIZATION

**The Problems of Food.**—The last and greatest era in the development of civilization began in earnest when from about the middle of the eighteenth century machinery was definitely applied to the manufacture and transportation of goods and to the production of foods. The really great problem of material civilization is to multiply food supplies and to satisfy the material wants of humanity. Population increases easily and readily under favorable conditions, but food supplies come only by hard work and mental toil. Malthus and his followers have shown the real connection between population and food supplies, holding that, under natural conditions, the former tends to multiply far more rapidly than the latter. Without an abundant supply of wholesome food man cannot do his best work nor develop a high civilization. Every rapid and permanent multiplication of food supplies, therefore, furnishes the basis for an increase in

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<sup>10</sup> For brief discussion of nationality, see Willoughby, *op. cit.*, pp. 120-122. For modern illustrations of nationality, note the attainment of statehood, as the result of the Great War, by Poland, Czecho-Slovakia, Jugo-Slavia, and the little East Baltic States such as Finland, Lithuania, etc.

human energy and progress. All the great eras of human development have been preceded by a permanent addition to the sources of food supplies. This may be illustrated by the development that came from the use of weapons in hunting, tools, and machinery in industrial life, and from the utilization of power in production and transportation.

**Invention of Tools.**—If one traces the wonderful history of human ingenuity in comprehending the forces of nature, enslaving them and compelling the energy of the universe to do the will of man, it becomes possible to understand what a powerful stride was taken in development when men for the first time consciously fashioned nature's materials into tools and learned the art of utilizing natural power. The first step in this direction was the beginning of civilization, and from the very start the importance of the achievement was realized. Men die, but their ideas and inventions live after them. Each new acquisition becomes the parent of many others, and each contributes its quota to the multiplication of human possibilities.

From the time when primitive man began to utilize as a weapon a rude club or a clinched stone, his development has been marked by a steady advance in invention. The club and the stone united formed the hammer and the ax, the sharpened stick for digging purposes developed into the spade, the hoe, and the plow. The edged tool typified by the knife developed from the keen edge of a sharp chip of flint. From such primitive tools have developed slowly, but with rapidly accelerating speed, the numerous forms of tools and weapons used to-day in military and industrial life. Each great stage in economic development stimulated men's inventive faculties

and enabled them the better to utilize some newly discovered force of nature. Fire was rendered obedient to the human will; wind and water were harnessed for purposes of transportation; the utilization of the force of gravitation gave strength to human muscle; the inventive capacity of the race learned how to control the energy of steam and electricity; and for many ages the knowledge of the possibilities arising from the comprehension of the organic world, and of the utilization of the fecundity of nature, has furnished tangible and direct results in the multiplication of food.

**Utilization of Natural Power.**—Thousands of years lie between the first rude boat in the form of a log, paddled by hand, and the developed ocean liner of to-day. Yet they are alike in that they both utilize natural power for purposes of transportation. The real distinction is quantitative not qualitative. The one transported with difficulty and danger a few pounds at a snail's pace, the other carries swiftly and safely thousands of tons' burden and hundreds of lives. This development in the use of machinery had been slowly going on ever since the human race began, but about the middle of the eighteenth century men apparently had reached their wits' end in productivity. Production by hand and by crude machinery worked by hand or animal labor was not sufficient for the demand. Population was checked through the relative dearness of food and necessities, and commerce could not expand through lack of goods to export. England had immense wealth in iron ores and coal, but not even the muscle of the "village blacksmith" could turn goods out cheaply enough and fast enough. At last, in 1769, after men had experimented for at least a hundred years with steam, came Watt's steam engine.

In the nineteenth century came the knowledge of the use of electricity, and from these times the inventive ingenuity of the Western nations has been devoted to the multiplication of machinery so as to utilize the boundless energy of the universe through control over the power generated by steam and electricity. The significance of all this is that the productive capacity of the human race in both goods and food supplies is multiplied many thousandfold, with the advantage that machines, instead of demanding their proportionate share of organic food, are satisfied when fed with fuel. In other words, the productive power of the population may be multiplied geometrically but its consumptive power arithmetically. Western nations, therefore, may under normal conditions of peace expand their populations and yet through machinery and commerce multiply food supplies in such abundance as to banish almost from possibility the danger of famine. The inevitable effect of an expansion of material capacity is a corresponding expansion of intellectual attainment. Scientific discoveries in chemistry and biology, rendered possible by material development, powerfully aid in their turn in the development of food supplies and other material necessities.

**The Struggle for Supremacy.**—As a further result of this development, commerce has multiplied past all precedent, every corner of the habitable earth has become known and explored, hermit nations are forced out for better or for worse into Western civilization, and governmental activity has expanded so as to meet new conditions. Larger interests, greater wealth, and increasing population give greater fighting power, and the leading nations are inevitably driven into competition for world empire. In the competition they seek to

develop material and mental capacity, so as to attain supremacy in international affairs; they seek to expand by extending their sway over nations inferior in attainment, and they of necessity must readjust their political organizations so as to manage more wisely their growing interests. In such an age as this, after so great a war, political change is inevitable. Inevitably the readjustments of the peace treaty will prove but temporary, unless by chance a World League is organized, backed by moral and physical power enough to keep the peace of the nations. World politics of the present finds no place for the petty state, the backward nation, the ultra-conservative people. Inevitably the more vigorous will grow at the expense of their weaker neighbors. The age demands from states as well as from individuals broad and high intelligence, moral energy, capacity for hard work, and bold initiative and invention. Intelligence in the state involves democracy in the system; immense resources demand executive and administrative capacity; the necessity of accomplishing a desired end by concentrating every possible ounce of energy at the proper place insures concentration of governmental power. Such capacities and virtues, in a struggle for national existence or world supremacy, are not matters of indifference but necessities for survival, and hence the present age tends to develop a political theory suited to the attainment by states of whatever will contribute to the highest development of their peoples.

**Summary.**—The various aspects assumed by the state in the course of its historical development may now be noted in review. In primitive times are to be traced the beginnings of the fundamental ideas involved in the

theory of the modern state; the loosely organized horde represents the nation, and the power wielded by its natural leaders typifies the power of sovereignty in later times. The pastoral stage of the patriarchal period substituted the tribe for the horde, and gave greater definiteness to the organization of the community. The agricultural stage gave the clan or the village community, which slowly developed by conquest and alliance into loosely confederated leagues and empires. The influence of rapidly growing commerce gave birth to the city state, best known in the familiar Greek form, but found also in the mediæval cities of Germany and Italy. In the East, in Greece under Alexander, and in Rome, as well as in later Europe, developed the idea of a world empire, the dream and the ambition of every great military leader of all times. This ideal was translated by Christianity into visions of a spiritual empire, in which all the nations of the world would pay allegiance to the Founder of the Faith, and, with the development of the Papacy, to his successor seated in St. Peter's chair at Rome.

The rise of commerce first with the East and then with the West, and the consequent differentiation of interests among the peoples of Western Europe, resulted in the formation of national states, each held firmly together by ties of common interests and nationality. Intercourse among these gave great impetus to the development of diplomacy, international law, and to the appointment of permanent embassies, all designed to aid in the development of economic interests, the maintenance of peace, and the partial humanizing of war. The discovery of America not only poured mineral wealth into the impoverished nations of Europe, but ushered in the great era of colonization in which Portugal, Spain,

Holland, France, and Great Britain vied with one another in seeking out by exploration all of the unknown world that could be utilized for purposes of commerce and exploitation. The eighteenth century gave to political life the parliamentary system of England, the centralized empire of Napoleon, and in the United States of America the federation, an improved form of confederation, combining in one organization the advantages of autonomous commonwealths with the high centralization of an empire in matters of general policy. This form, so well adapted to the needs of great empires, is rapidly proving its utility as a form of government and, indeed, the time may yet come when the smaller states will best secure their autonomy and nationality by uniting in federation with one another and with the larger leading states.

These in brief are the epochs in the development of political government and if this line of evolution and these types of governmental forms be fixed in mind, the development of any of the historic states of the world can be followed with much greater ease and profit.

## CHAPTER IV

### DEFINITIONS AND EXPLANATIONS

**Political Organization.**—In any careful study of political science it is essential that from the outset the most common terms in use be defined as the basis for the more detailed study of later pages. Admittedly there is no standardized set of definitions common to all writers in the science, but for that reason it is all the more necessary that each explain clearly the meaning he attaches to general terms.

The state, it will be remembered, is one aspect of society. Society is the more general term including as it does the many forms of human association. Human beings habitually tend to associate together in social groups or communities. In a *community* the members are held together by the permanent and powerful ties of common blood, language, customs, religion, and economic occupations. In such communities special associations are naturally formed for the purpose of safeguarding and developing some particular common interest or set of interests, a tendency especially characteristic of higher civilization. But when a community definitely and permanently becomes organized as a unit for the protection of the life and property of the whole community, then we think of it as politically organized and call it a *body politic*.

All bodies politic are not states. Throughout the in-

habited world there are numerous bodies politic, large and small, each definitely organized for the protection of life and property, but most of these are in subordination to similar but larger organizations. Some of these larger organizations are recognized as independent and sovereign, in which case they are known as national bodies politic or *nations*. The subordinate bodies politic are known by such names as provinces, departments or counties, cities or municipalities, and townships, villages, or communes. A *state* in political philosophizing may best be defined as (1) a sovereign political unity,<sup>1</sup> or, if studied concretely, *i.e.*, as a nation with its governmental organization, it may be defined as (2) a national body politic having sovereignty.

The term *people* is applied to the collective mass of inhabitants having domicile within the state, owing it allegiance, and entitled to its protection. When emphasis is placed on the fact that the state has authority over its members, who owe obligations and duties to the state, these are called *subjects*; if emphasis is on the fact that the members have rights within the state, then the term *citizen* might better be used. The word *nationals* is used in international law as a neutral term implying allegiance and protection but emphasizing neither rights nor obligations. In constitutional forms of government adult citizens, under certain restrictions, are given the right to participate in government usually by bestowing on them the rights of suffrage and office-holding, and the collective body of such citizens is known as the *electorate*. This body in popular discussion is regularly assumed to be the exponent or mouthpiece of the people.

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<sup>1</sup> The definition minimizes the concrete aspects of the state, stressing rather the notions of unity and sovereignty.

As the state with its sovereignty is the nation organized for the protection of life and property, there will evidently be in every state a definite political organization authorized to exercise the powers included under the sovereignty of the state. This organization is called the *government*, and may be defined as that organization to which is entrusted by constitution the right to exercise sovereign powers in the name of the state. The state is often thought of as a person and as a person has a will. The will of the state when formulated, becomes *law*. This will may be formulated in customs having a legal sanction or in commands written or unwritten. Law is distinguished from social customs in that it is enforceable by the sovereign power of the state, whereas customs are enforced by social authorities. The highest form of law is the law of the constitution.<sup>2</sup>

**Sovereignty.**—The distinguishing characteristic of the state in contrast with other social institutions is its possession of sovereignty. As a state exists in order to safeguard the interests of the community, it must evidently have authority to command the services of its subjects and power to enforce its commands. This authority and power is called *sovereignty*, and sovereignty may be defined as the supremacy of the state over other social institutions and over the lives and property of its subjects. It is the most essential attribute of the state. There can be no state without sovereignty and every body politic having sovereignty is a state. The word "supremacy" must not be interpreted in the sense of partial supremacy. Sovereignty implies absolute supremacy. A state must be entirely free from the domination of bodies politic external to itself, and must be

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<sup>2</sup> See page 128.

completely supreme within its own borders. It cannot surrender in whole or in part its sovereignty and remain a state. It may delegate the exercise of one or more of its sovereign powers to bodies politic subordinate, or even external, to itself, if only it reserves the right to recall such delegated power or powers at will. Every political power, therefore, exercised by a subordinate body politic within the jurisdiction of a state, is derived from the sovereignty of the state, which may recall that power at will.<sup>3</sup>

**Sovereignty in International Relations.**—It should be said, however, that in international law some explanation or modification of this theory of absolute sovereignty is necessary. In the international world there are powerful dominant states to which the theory of absolute sovereignty fully applies. There are other states, however, which do not seem to have complete sovereignty. They are, to some extent, whether large or small, under the control of more powerful states. They are spheres of influence, spheres of interest, they are in tutelage, under protection, or exist merely on sufferance. China, Persia, Liberia, Cuba, Haiti, Santo Domingo, and many others are illustrations of such relationships.

It may be said that each of these states really is sovereign and of its own accord (under duress) agrees to allow the superior state to guide its international affairs

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<sup>3</sup> Advocates of syndicalism (France) or guild socialism (England) object to such definitions of sovereignty, fearing what they call the "absolute state." These objections, in the author's opinion, are based on a confusion in the mind of the critics between state and government, state and society, and law and ethics. The absolute sovereignty of the state is entirely compatible with the most radical democracy on the one hand or the most extreme governmental autocracy on the other. The distinction is made by many or few regulations or restrictions on government through the constitution, as explained in later paragraphs of this chapter.

in whole or in part, reserving the right to recall at will such permission. This explanation would satisfy the theory but, of course, is mere camouflage. Or again, one may deny the definition of sovereignty as absolute and define it as divisible, in which case the sovereignty is considered as divided between the superior and the inferior states. Or one may plainly assert that the so-called states are not really states at all. They may have been so once, and they may become so again, but as long as there are certain powers which they cannot exercise except at the consent of the superior state, they for all purposes have lost their sovereignty and are subordinated to the dominant state or states.

The theory of the equality of states in their sovereignty dates from the time of Grotius, but in practice at least, from the standpoint of power and quality of political life, there are several grades of "states," and it is an international legal fiction to speak of all as equally sovereign. This "infringement" on the sovereignty of the smaller by the larger states may even extend to interference in domestic affairs, and not merely in international relations. This, of course, is simply a larger extension of the power of the dominating state. China, Haiti, and Santo Domingo illustrate this stage of interference.

**Limitations on Governments.**—In respect to a state's sovereignty over other social institutions and over persons, objection is sometimes made that this supremacy of the state is a dangerous power and might easily result in despotism and the destruction of personal liberty. This objection is made, as a rule, by those who confuse state and government, identifying one with the other, as was customary in earlier political theory. The familiar

saying, attributed to Louis XIV, illustrates this idea—*L'état, c'est moi.* If state and government were identical, the objection would be well taken. By definition, however, the government is merely the organization of the state. The state by constitution may place restrictions on government, forbidding it to practice tyrannical acts. After all, the aim of the state is the protection, not the destruction, of life and property and with all its defects it has measurably succeeded in its purposes. Tendencies toward governmental tyranny can regularly be checked by an intelligent citizen body, who, through revolution if necessary, can so arrange the constitution of the state as to make the government a powerful agency in the development of all that is needful and helpful in national prosperity. The state through its government may properly exercise whatsoever powers seem necessary and expedient for national welfare, provided that, in so doing, it meets with the tacit approval and hearty support of the people. If, in the opinion of the people, it is inexpedient to allow the government to exercise large powers, constitutional restrictions can minimize governmental activity almost to the vanishing point. If, on the other hand, it seems wise to enlarge the powers in exercise, one limitation after another can be removed, until the government may direct and regulate a very large proportion of the powers included under the notion of sovereignty.

Such limitations on the exercise of sovereign powers take the form of bills of rights, constitutional regulations of governmental power, and control over officials (through elections or the recall, for example), effective enough to make them useful agents rather than tyrannical masters of the people. Just as an autocratic king

may be so dominated by his ministers as to be a mere puppet in their hands, so a sovereign state may have its governmental organization so wisely regulated by constitutional provisions as to make it the greatest factor in the development of social progress and individual happiness.

**Public Opinion.**—These regulations or limitations will naturally arise through the expression of an intelligent public opinion. Yet as a matter of fact even in modern democracies the expressed will of the government is only approximately like that of the people, and is frequently quite different. Hence the state, voiced by its governmental organs, frequently clashes with public opinion. If this has formal and regular channels<sup>4</sup> through which it may readily influence the government—well and good; but if not, then that state has a constitutional system which does not truly represent, and there will inevitably arise, with the growth of intelligence, discord, internal strife, and revolutions. This condition is so common even in the present century that much more attention should be devoted on all sides (1) to the development of an intelligent public opinion voicing all the interests of society, and (2) to the perfecting of governmental organization so as to allow such public opinion definitely and forcefully to express itself in the formulation of a wise national policy.

If, on the other hand, the government of a state is plainly autocratic, and the ruler or ruling class fails to make concessions to the growing intelligence of the people, then there is no other recourse but to do as so many nations have done in past times—the people should assert

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<sup>4</sup> Such as an electorate with fairly large powers, or political parties enjoying the rights of free organization and free speech.

the right of revolution, should take up arms and overthrow the tyrannical form of government and should organize in its place one more in harmony with the demands of modern freedom and constitutional liberty.

**Development of Sovereignty.**—The conception of sovereignty as supreme authority over other social institutions and over the lives and property of subjects is the most essential principle in the modern theory of the state. A brief statement, therefore, in respect to the development of this idea of sovereignty may prove of interest. It has already been said that when a community definitely organizes itself for self-protection, it thereby becomes a body politic. In early civilization, as already explained, long before private property developed, communities organized war bands in order to make raids against weaker neighbors or to resist inroads on the part of warlike enemies. Such a necessity was ever present in those troublous times, and the duty of fighting for the common welfare was incumbent on every member of the community able to bear arms.

If communal life was peaceful through abundance of food supplies and absence of aggressive neighbors, notions of economic control might readily arise in the regulation of working customs and property rights, since the notion of general welfare might involve communal rights in foods and property as the fundamental condition of life. But the embryonic government, whether fundamentally a war band or a peaceable economic group, did not assert its right at that time to regulate religion, private quarrels, or individual property rights as these developed. It merely protected general interests in times of offensive or defensive war and left to the family and to similar social institutions the regulation of other forms

of social life. As population and wealth increased, and human social relationships became more complex, the state slowly but surely began to extend its jurisdiction over the family, withdrawing by degrees from the control of this institution the regulation of property rights and the safeguarding of life. At the same time, by similar processes, the authority of religious organizations became more and more subordinated to the state.

**Sovereignty as Supremacy.**—Through this extension of authority, the power of the state was greatly enlarged, and a theory of sovereignty as supreme power was slowly developed in order to justify the greater activity of the state. Such a theory of sovereignty may be traced in Athens, in Rome, and in Europe after the Renaissance. It was common enough even in mediæval academic discussions, but did not become current until the seventeenth century. The enormous development of wealth and population since that time has caused the general adoption of such a definition of sovereignty, for the reason that an efficient regulation of public interests demands a much larger sphere of governmental activity. Older theories in consequence have to be modified to suit the newer conditions. The political theorists of the Reformation, typified by Bodin and Hobbes, and the social contract writers of later times, Locke, for example, brought the matter definitely into discussion, until finally Rousseau, in his *Social Contract*, sought to show how a theory of absolute sovereignty might be harmonized with democracy.<sup>5</sup> Ever since that time, the theory has been worked out more carefully in details, and is coming more

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<sup>5</sup> Dunning, *Political Theories*, and Merriam, *History of the Theory of Sovereignty since Rousseau*, may be used as guides in the study of sovereignty.

and more into acceptance. Whether fully accepted or not, all progressive nations assume the theory to be true, and extend governmental jurisdiction over any function whatsoever when public interest seems to demand it. In this way economic, domestic, and religious institutions are increasingly passing under the power of the state. Illustrations of this tendency are seen in protective tariffs, banking and currency legislation, in the subordination of the church to the state, in the regulation of inheritances and kinship rights, in civil marriage and divorce, and in the secularization of education, and the assumption of it by the state as a public function. It should not be assumed, however, that social institutions and individuals will ever be completely dominated by the state. The supremacy is in theory only, so as to allow for emergencies. In actual practice any modern state grants virtually autonomous powers to family and church and to individuals in their general social life.

**Protection of Life and Property.**—Though the early and the late theories of sovereignty seem so far apart, they can by interpretation be made to harmonize. Sovereignty still implies that the state merely protects life and property, but the difference lies in the meaning assigned to the terms. *Protection* is not only defense against the positive aggression of a hostile foe, but denotes also a parental care which shields against every possibility of harm. *Life* is not merely the securing of physical existence, but also the fostering of mental and spiritual life. *Property* includes not material wealth only, but intangible goods, such as reputation, rights, and happiness. Under such broad definitions the protection of life and property has come to mean that the state may do anything expedient, and with such a scope for govern-

mental activity sovereignty can only be defined as absolute power. One may, however, feel sure that in general the power of the state will be exercised *pari passu* with the utilization of scientific methods in government, and with the attainment of broader intelligence on the part of the people. The scope of power exercised by a despotic government is in fact very much less than that exercised under constitutional democracies.

**Importance of Political Theories.**—Discussions of theories such as these are not merely questions for practice in debate. They are attempts in explanation of the great problems presented on all sides in political life. New conditions of life compel new theories and restatements of older theories. A great theory clearly explained is a revelation to the men of its day. It shows them the causes and the reason underlying the life of their time, it epitomizes complex phenomena so that the average man may understand, and it is one of the greatest aids to the development of a larger interpretation of civilization. When civilization is practically stationary, political theorizing is merely a formulation of accepted and authoritative beliefs in regard to the existing order of things. Furthermore, in ancient periods the authority of the state was so largely restricted by powers held by family, church, and economic groups that discussions in regard to the state were relatively unimportant. But in times of transition or of rapid development there are regularly wide differences in political theories, and these should be carefully scrutinized so as to obtain a clearer and more scientific explanation of the facts and tendencies of political life. Such explanations will throw light on the principles involved in the evolution of the state, on the relative importance of the individual and of the

nation, and on the governmental exercise of sovereign powers. They make clearer the value of democratic and aristocratic ideals, and indicate the emphasis that should be placed on moral, educational, and economic factors by wise statesmen.

## CHAPTER V

### SOVEREIGN POWERS, TAXATION AND WAR

#### SOVEREIGN POWERS

**The Essential Aspects of Sovereignty.**—From the consideration of sovereignty itself we may now pass to the discussion of the several powers included under that term. In legal discussions the authority of the state in respect to the protection of life and property is often discussed as the war power, the police power, or the power to preserve the peace of the state (the king's peace). But whatever particular name may be applied to the acts of government, whether performed in carrying on war, in suppressing riots and rebellion, in checking crime, or in educating its citizens and safeguarding their health, it is but another name for sovereignty, which is the collective term for whatever power is possessed by the state and exercised by the government. Certain aspects of sovereign power, however, are so important in themselves that it is customary to speak of sovereignty as though made up of essential powers, such as the war power, the police power, the power of taxation, and the power of eminent domain.

By *police power*, a term under which should properly be included the so-called war power, is meant the power of the state to do anything needful for the safety and welfare of the nation (*salus populi suprema lex*). The power of *taxation* implies that the state may demand

from its subjects the services and property necessary for its support. The power of *eminent domain* implies that the state has the right to take from its subjects their lands or property for public use. In all states that have developed along democratic lines these powers are constitutionally safeguarded, so as to secure the people against governmental tyranny, as, for example, when the constitution provides that the government make proper compensation for lands taken under eminent-domain proceedings. In practice, however, it is understood that such restrictions are for times of peace. When stern necessity demands it, the riot act is read or martial law proclaimed, civil and constitutional guaranties, like *habeas corpus*, are suspended, and the government, in the exercise of the so-called war or police power, takes into its hands the full powers of sovereignty over life and property on the plea that *inter arma leges silent*. In well-ordered states, when the crisis is over, the government may be brought to account for the exercise of any unnecessary arbitrariness. Whether in times of war or peace, the acts of government are assumed to be performed *pro bono publico*. Acts for individual or class benefit against public welfare are never constitutional but are mere acts of tyranny. Against such there may by chance be a legal remedy but a series of tyrannical acts without redress justifies revolution.

It is easy to see in all this that the so-called police power is merely another name for sovereignty, and that the other so-called essential powers are simply implications arising from that. If the state is to protect the nation from harm, evidently it must have the power to raise the means for the performance of this duty. It may do this by demanding the services of its subjects, or by

levying a *per capita* tax on them, or by taking from them or some of them whatever property it needs. All methods are *unpopular* with subjects, who never pay taxes with cheerfulness or perform forced labor for the state with alacrity. From hard experience the state has gradually learned to compromise with its subjects, and now regularly accepts a financial equivalent for services and an annual payment for the support of the government. But in case of necessity the state does not hesitate to order its able-bodied subjects into the army or navy, or to compel them to assist in the suppression of crime, or to labor on public works or in the public service, even without compensation. Nor would it hesitate under similar circumstances to levy forced contributions from the wealthy, or to appropriate to its own use supplies wherever found, or to seize any land needed for public use. In other words, the sovereignty of the state implies a virtual ownership of the services, property, and land of its subjects, as far as these are necessary for the preservation of the life of the state. The decision as to the necessity of all this lies with the state through its officials, who are restrained either by constitutional checks or by the fear of assassination, rebellion, or revolution.

**The Development of Sovereign Powers.**—The state of former days in the exercise of its powers devoted most of its energy to war and to the maintenance of internal peace. Yet as it assumed authority over the many aspects of social life including economic organizations, the family, and the church, it deprived these of many powers formerly under their jurisdiction. From the family, for instance, it assumed regulation over such

matters as kinship, marriage, and inheritance; it is now gradually assuming many of the functions once exercised by the church, such as education, the administration of charity, and the regulation of morality, health, art, and amusements. In recent centuries the church itself has in some states fallen under governmental jurisdiction, so that its organization, and at times even its theology, is regulated more or less completely by law. Economic institutions admittedly are so fundamental to national prosperity that government finds it impossible to let them alone (*laissez-faire*) and is constantly "interfering" with them so as to promote national economic well-being.

In order, therefore, to have in mind the trend of governmental activity, some attention should be given to the development of the exercise of sovereign power in the more important of these fields,<sup>1</sup> prefacing the discussion with a brief account of the development of taxation.

### FORMS OF TAXATION<sup>2</sup>

The power of taxation has become increasingly burdensome with the growth of the scope of governmental activity, since the state in exercising its supervisory and administrative powers has regularly proved to be an expensive necessity, and the burden of taxation has too often been a source of discontent and rebellion. A state best shows its wisdom when it proves able to raise an income that will at once support the government gener-

<sup>1</sup> Good illustrations of the early functioning of a state may be found in Stubbs, *Constitutional History of England*, vol. i, and in Gummere, *Germanic Origins*.

<sup>2</sup> In Bibliography, Section III, see Dowell, *History of Taxation in England*.

ously and yet not check productivity on the part of the people. An efficient system of taxation is one of the highest marks of statesmanship. It is essential, therefore, that one have in mind a brief outline of the numerous forms and methods of taxation used by the state in the course of its development.

**Taxation through Service.**—Taxation in its early crude forms was naturally suited to the conditions of savage or barbarian life. As war was the chief and almost only business of the state, its activity was intermittent. Taxation consisted in a demand for the services of its fighting men for war and of other capable members of the community for purposes of advice, defense, and maintenance. In time came regulations as to the kind of arms and the amount of food and other supplies each should furnish. If the number of fighting men was in excess of the demand, a system of drafting developed. The state's power of taxation, then, implied its right to enroll or to conscript its able-bodied men for war and to demand suitable arms and supplies. Other governmental expenses, if any, were met by the chiefs or kings themselves, who considered governmental privileges and responsibilities personal perquisites, not a public trust, and naturally, therefore, paid expenses from their own private incomes. Offerings, gifts, and tribute from subjects and subordinate communities furnished substantial additions to private funds, and special expense might be met by forays on neighboring enemies or by confiscations and seizures. Public lands, also, won by conquest or held in joint possession,<sup>3</sup> often furnished a large source of revenue.

<sup>3</sup>For example, the *ager publicus* of Rome, the Crown lands of England, or the public domain of the United States of America.

As the state grew in importance, it assumed other functions that involved men's services. Roads and bridges had to be built for war and commercial purposes; public buildings, such as temples, palaces, monuments, and fortresses had to be erected; cities were founded, irrigating canals dug, public lands cultivated, and civic business administered. All these involved taxation, and the system employed was similar to that used in war. All able-bodied men, for example, might be forced to labor, or a district might be required to furnish a quota of workers, or a tax might be levied from the proceeds of which necessary public work would be performed. In earlier systems office-holding, like other services, was compulsory and often involved irksome toil and heavy expense, so that only wealthy nobles might hold office. It is in modern systems that the emoluments of office cause it to be sought. As class distinctions developed, taxation became differentiated. The landed nobility held office and performed war duties, wealthy merchants paid heavy taxes and the poor were liable to industrial labor and war service.

**Taxation of Property.**—A definite system of taxation came into use with the rise of private property and the personal ownership of flocks and the products of agriculture. Its first form was the levy of a definite per cent of the produce of the flocks or herds or of the fruits and crops of the land. The privilege of collecting this, involving much extortion, was given to favorites or sold to collectors, the *publicani* of the New Testament. At a later period the tax on the produce of land was transferred to the land itself. When to this was added a tax on property fixed to the land, *e.g.*, a building, we have the modern idea of real estate as distinct from movable,

or personal, property. Personal services were gradually commuted for other forms of payment and are now rarely demanded except for purposes of war. At the time of the great earthquake in San Francisco, for example, all able-bodied citizens were compelled to work on the ruins; in some rural sections of the United States road taxes may be paid in money or worked out through personal service in the construction or maintenance of roads in the taxpayer's district.

In farming communities real property is naturally large in amount when compared with personal property, but the rise of commerce and manufactures multiplied this latter form of property, resulting in the development of newer forms of taxation. Besides the direct tax on personal property, always hard to estimate and to collect, came taxes on goods sent out or brought into a country, the modern export and import taxes. Again, a tax might be levied on goods manufactured for the purpose of domestic sale, or on the sales themselves, or on the profits of business transactions; or on special business transactions, as a stamp tax; or on occupations, a special form of which is the license tax, for permission to enter on business which from its nature must be under governmental supervision, such as the sale of liquors, explosives, or poisons. A common but obnoxious tax is the poll, or head, tax. Income and inheritance, or legacy, taxes have a history of many centuries. They were levied in the classic period and owing to the exigencies of the war period have become increasingly popular with governments. Taxes on corporations and on franchise privileges furnish a constantly increasing revenue for the state. The state even may itself engage in business for public-welfare purposes and derive income from the ex-

cess of profits over expenditure. The conditions of modern business life are so complex by contrast with those of former centuries, that national systems of taxation are undergoing rapid changes and are constantly subject to revision so as to suit newer conditions of economic life and changes in the variety and intensity of public demands.

**The Budget.**—The expense of government is so influenced by the whims and private interests of citizens and office-holders, that it has often proved difficult to balance expenditures with receipts. Then, too, sudden emergencies, such as war, or unusually expensive public works, might make an unexpected deficit. For this reason in modern states a budget is carefully prepared in advance, showing possible expenses and estimated receipts and indicating changes needed in taxation so as to avoid too large a deficit or surplus. In the United States the national government is slowly moving towards the adoption of a budget system and about three-fourths of the commonwealths (states) have already adopted some form or other of the budget. In less scientific days, in case of special emergency, great reliance was placed on forced loans, or on the confiscation of the property of persons charged with disloyalty, or of wealthy corporations like the church, or of unpopular foreigners like wealthy Jews. Fees from petitioners or from litigation furnished a large source of revenue, as also the income from the sale of office, special privileges, or monopolies, or from the debasement of the coinage. Under color also of such powers as maintenance, purveyance, and eminent domain, or the right of seizure in time of war, large additions to revenue could be made when necessary. All such irregular forms are passing out of use, and in

constitutional governments seizure of any sort is now regularly accompanied by a fair compensation to the owner.

Aside from the difficulty involved in settling on the kind and subject of taxation, there are inherent difficulties in devising efficient systems of assessment and collection. The old-fashioned system of "farming" or leasing out the privilege of collecting taxes, so productive of tyrannical abuses, and its counterpart in feudal lordships and dues, have been superseded by elaborate schemes of assessment and collection by responsible governmental officials. The ideal of a fair and impartial assessment is exceedingly hard to realize, and in practice the burden of taxation, both direct and indirect, is proportionately heavier on the average person of small property and income. Such evils will slowly disappear as a more intelligent democracy dictates the policy and administration of government.

### THE WAR POWER

**War and Peace.**—The original sovereign power of the state, as already explained, is that of war. Even now a state's chief business is to be ready for war and to wage it whenever national safety or national interest demand it. In modern times diplomacy along with methods of arbitration is becoming increasingly important as a means whereby dangerous disputes may be adjusted and treaties for offense and defense negotiated. In a rude civilization a formal notification of war is not deemed necessary; each state seeks to attack its rival unawares and preferably when the latter is poorly prepared. In more developed states a formal notification

is common, though diplomatic negotiations usually supply the information long in advance of the formal proclamation. In theory no state declares war or makes peace without the consent of the dominant interests or classes within the state. In practice this power has to be confided to the head of the state in order that no time may be lost in case of emergency. The head of the state, however, is always in touch with the leaders in national affairs and is advised by them. These dominant interests vary with the economic development of the state. At first they were voiced by the elders and war leaders of the horde, then by the heads of families in early patriarchal times, at a still later stage by the heads of all important clans and families, together with men eminent for public services in war or peace. When commercial states developed, the possession of large wealth, whether personal or landed, gave the owner a voice in council. To the voice of these has been added the will of the people as a whole, made known through their representatives. Rarely would a modern state venture upon the step of declaring war or of making peace without the hearty accord of public opinion formally or informally expressed.

**Service in Army or Navy.**—All able-bodied men by theory must serve in the army or navy or in services subsidiary to these. In times of great stress women also may be drafted into the industries or into vocations suited to their strength. If war is always imminent, all men are given a military or naval training and a sufficient number kept in readiness for immediate service. If a state is so situated as not to fear war, it does not enforce military service and depends on volunteers in cases of emergency. Occasionally a small standing army is main-

tained as a nucleus about which a larger army may be formed. In the same manner a navy, large or small as may seem best, is kept in readiness for emergencies. In tribal states petty wars were fought by volunteers who delighted in the excitement of battle; larger wars demanded the services of all the men of the tribe. In the stage of developing confederation, or feudalism, each district sent its quota for a common war. In modern times the state keeps a permanent paid army in its service, and supplements the services of these by volunteers and by drafts of men levied from districts in proportion to population.

States in times of stress have used slaves in war but always under protest, fighting being considered the privilege and the duty of freemen. Convicts and criminals occasionally have been sentenced to serve as a punishment, but this custom is now condemned as derogatory to the service. Occasionally states have hired foreign mercenaries to fight in their wars, but this custom also is no longer favored. In the Great War imported laborers, chiefly from Oriental countries, were employed behind the battle line in great numbers by the Entente Allies so as to allow them to put more men into combat organizations.

The burden of supplying ships and men for the navy used to fall on seaport communities only; gradually a permanent navy developed, supported by the state and supplemented by vessels seized or bought at the outbreak of war. The use of privateers also was once common but is now practically condemned by all leading nations. Commercial states using the sea support large navies so as to protect their commerce in case of war. The importance of "sea power" as a factor in world su-

premacy has become fully recognized since the publication of the late Captain A. T. Mahan's great book on that subject.<sup>4</sup>

Positions of command regularly belong in old-fashioned systems to men of the higher social classes, with occasional exceptions in the case of men of decided talent who may rise from the ranks. The present tendency is to make all positions of command open to merit, and this system holds in democratic states. The training of men for war was in early times the duty of the older experienced warriors. At a later period the family and the community respectively trained their members. At the present time the state either directly trains its forces or fixes standards and supervises administrative districts in the performance of this duty. Scientific technical training is also furnished by the state for the officers of the army and navy and vocational training given to many of those enlisted, so as to supply skilled workers to the many branches of the service.

In earlier systems armies subsisted by foraging or plundering while on the line of march. Each man furnished his own equipment, according to a set standard; the wealth of a person determined the branch of service he entered; the wealthier served in the cavalry or in the heavy-armed troops, and the poorest as light-armed troops. The expensiveness of modern equipment and the great size of armies compel states to furnish all supplies of weapons, equipment, food, medicines, and other necessaries. So important has the supplying and transportation of armed forces become that the whole matter has become a special study under the name of

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<sup>4</sup>See Alfred T. Mahan, *The Influence of Sea Power upon History*.

Logistics.<sup>5</sup> The branch of service entered is determined by skill and choice. The science of war has become so systematized that immense sums are annually expended in the building of military roads and fortifications, in the accumulation of all kinds of military and naval stores and in recent years in development of aerial and submarine services. Naturally there is a definite system of rules and regulations which govern the military and naval forces of a nation, but in democratic governments these codes are sometimes formulated by the lawmaking body so as to render the armed forces of the nation subordinate to the civil department of government.

**Beginnings of Diplomacy.**—In earlier political life warring communities fought until the one or the other was exterminated, or both from exhaustion were compelled to desist. Gradually a rude method of negotiation grew up through heralds, whose persons while in the performance of their duties were sacred. Through these, treaties and agreements were made and sanctioned with much ceremony and the taking of oaths. Even in very early times formal treaties were made. One of the earliest extant dates back to the thirteenth century B. C., being a treaty between Rameses II and the Kheta, or Hittites.<sup>6</sup> In the Middle Ages began the custom of sending permanent diplomatic agents to the courts of those nations with which the state had dealings; through these much information was secured of great use to the respective states, and disputes were occasionally settled without war. Then began consular systems whereby each state sends business agents to the chief business centers of

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<sup>5</sup> See book with that title by Colonel George C. Thorpe, Section IV of the Bibliography.

<sup>6</sup> *Records of the Past*. First Series, vol. iv, pp. 25-32.

other states, usually seaports, and through these secures information of great value for commercial interests. These agents also transact important details of administrative business for travelers and traders.

Another important development has been the employment of Boards of Arbitration, Joint Commissions, and The Hague Tribunal. These consider such matters as may be referred to them, hear arguments on all sides, and settle amicably disputes that otherwise would frequently end in war. The Pan-American Union of the Americas and the present League of Nations are promising organizations, aiming to avoid war by stressing the development of amicable relations among states and the employment of methods of conciliation and arbitration in cases of disagreement.

**International Law.**—In Western civilization the customs arising from this international intercourse did not attain an important stage until the sixteenth century, when the development of national states and greater intercourse through the development of commerce brought them into prominence. Grotius in his work, *De Jure Belli ac Pacis*<sup>7</sup> first systematized these customs by commenting on them and supplementing them from principles of Roman and natural law. Since his day many learned treatises on these customs and principles have been set forth, resulting in a fairly well defined code or set of rules and regulations for the guidance of nations in their intercourse one with the other. These are not law in the sense that they are customs, regulations, or commands enforced by a supreme sovereign authority. Though called international law, the term should be understood in the sense that the code is a collection of

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<sup>7</sup> First published in 1625.

customs observed by the greater states in their dealings with one another. No state is legally bound to obey these, unless they become by adoption part of the law of the land,<sup>8</sup> but states for expediency's sake usually conform to them, though they do not hesitate to disregard or alter them in certain particulars if it seems wise. International congresses also meet from time to time so as to declare adherence to principles agreed upon, such as the Congress of London (1908) or to formulate common policies and understandings, such as the Pan-American Congresses, or the Congresses that meet at the close of great wars so as to readjust international relations, such as the Congress of Paris (1919).

**Policy towards the Conquered.**—The early method of disposing of conquered communities was that of devastation. Torture and death were the fate of the males, slavery the lot of the women and children. At a later stage, after a slaughter of the contumacious, the remaining members of the conquered community were enslaved and kept permanently in social subordination. A third stage came when the conquered community was compelled to pay tribute to the conqueror, and to submit to his supremacy in governmental matters, but otherwise was allowed to retain its freedom and peculiar customs.<sup>9</sup> The policy of the maritime state of Athens towards its defeated commercial rivals was, after a partial massacre and devastation, to seize their fleets and to levy annual indemnities. At the present time in wars between civi-

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<sup>8</sup> The German Constitution of 1919 (Article iv) reads, "The generally recognized principles of the law of nations are accepted as an integral part of the law of the German commonwealth."

<sup>9</sup> See, for example, W. T. Arnold, *Roman System of Provincial Administration*, London, 1879. Caesar's *Wars* and Thucydides' *Peloponnesian War* furnish many illustrations of early methods.

lized states, the conqueror usually imposes on the conquered a heavy tax for war expenses, or indemnity, makes stipulations in regard to the causes of the war, and may demand a cession of territory or colonies. The war of 1914-8 resulted in a vigorous revival of the principle of nationality which has obtained in Western civilization since the sixteenth century.<sup>10</sup>

**Dominant Races.**—On the other hand, the theory of "dominant races" has never lacked for advocates. This theory, plainly stated, is that any powerful state may by open conquest or skillful diplomacy subdue weaker and inferior races and states and compel them to assimilate their customs to those of the ruling state. A war for pure aggrandizement probably would not be tolerated by other great powers, but a dominant state seldom lacks an excuse for aggression. The attack of Germany on Belgium and France was justified by German advocates of "world politics" but brought into the conflict ultimately practically all the states of the world on one side or the other.

**Race Conflict.**—Along with the theory of dominant races goes the theory of racial conflict.<sup>11</sup> Gumplovicz gave this theory its modern form, arguing that social and national progress depends on the struggle of races for supremacy. The conqueror imposes his will on the conquered and in due time through the processes of amalgamation and assimilation the two become blended into a new nationality. A weaker community which cannot or will not become assimilated disappears. As a

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<sup>10</sup> See page 39.

<sup>11</sup> This theory has been best worked out by Ludwig Gumplovicz, *Der Rassenkampf* and *Grundriss der Sociologie*. This latter volume has been translated by F. W. Moore, *Annals of the American Academy of Political and Social Science*, 1899.

rule if the conquered community is equal in quality to the conqueror, assimilation takes place at last, though with much bitterness and rancor. If such a community is inferior in quality, yet such that it can be utilized in economic life, it survives because of its industrial value and may perhaps very slowly amalgamate with the conquering race. If such a community proves to be socially inferior and economically useless, its members slowly disappear, wasted by contact with a superior civilization whose vices and diseases find ready lodgment in a population that has lost its self-respect and its reason for existence. This process of conquest and assimilation, harsh and cruel though it be, has nevertheless been in the past one of the greatest factors in civilization. A race developing only through natural increase tends to lose energy and vitality by inbreeding. Conquest involves more or less intermarriage between the conquerors and the conquered and a slow process of amalgamation takes place. From this crossing of blood and mingling of civilizations a new generation ultimately arises, stronger and wiser than either of its parent stocks. Every important race surviving to-day must in its history have been repeatedly subject to processes of amalgamation. Peaceful amalgamation is prominent to-day through immigration. The racial safeguard in amalgamation is that a superior race seldom amalgamates with a race much inferior to itself. Extinction, not absorption, is the ultimate fate of the latter.

**A World Federation.**—The rapid development of international comity in modern times down to the year 1914, brought into discussion the question of the future probability of a world state, a world federation. It seemed at that time undeniable that such a consummation

was within the range of possibility. Development along such lines was already manifest, as illustrated (1) by the growing identity of social and economic interests brought about by constant intercourse through modern inventions, (2) by the development of international law, comity, and arbitration, (3) by the development of common administration in such matters as postal service, (4) by the practical supremacy of four or five leading states over the world's territory and (5) by the growing humanitarianism of the age. All these seemingly pointed to a peaceable union of the human race under the supremacy of a developing confederation of leading states.

The Great War seemingly plunged the world back into an intense racial struggle for survival and intensified racial hatreds. It also brought in its train at the signing of the Armistice vigorous readjustments of governmental organization, not among the Central Powers only but among the Allies also. National boundaries were readjusted and new states formed on the basis of nationality.

A League of Nations has been organized, excluding the Central Powers for the present, and this in due time should accomplish much in removing causes of friction in the Eastern Hemisphere. On the other hand it is questionable whether the great nations can agree to divide the world's supremacy among them in an amicable manner. It may be that the tendencies which make for peace will develop a peaceable confederation, or the submission of the rest to the hegemony of one, but the probabilities hardly point in that direction. Western civilization is characterized by a fierce, warlike, competitive spirit that brooks no rivals in a contest for economic supremacy. The enormous cost of war and the terrible

loss of life involved in modern struggles are deterrent factors, but these sink away when the lust for gain and warring seizes by contagion entire nations.

A world state or federation would be strong only as its members were homogeneous in civilization and fairly well amalgamated in blood. When one reflects that by far the larger part of humanity live under backward civilizations and in tropical or semitropical lands, it becomes evident that amalgamation by blood would demand not centuries but thousands of years, and that a blending of such dissimilar civilizations is hardly possible. If, however, dominant states should hold such populations as mandataries, as England, for example, does India, and develop them in civilization as rapidly as possible, a firm and lasting unity might be secured that ultimately would become democratic. It may be that the future has some such solution in store for humanity. If so, then the dream of many Utopians may be realized, and humanity guided by a world policy may systematically utilize social agencies for the highest possible development of the human race. Indications along such lines will be much clearer by the end of the twentieth century, for civilization having passed round the world is centering its energies in the Western Hemisphere and in the Far East. The lands bordering on the Pacific will grow in importance during this century, and by the end of it the dense populations of China and India will probably have found their place in the politics of the modern world.

## CHAPTER VI

### INTERNAL PEACE, FAMILY, AND CHURCH

#### INTERNAL PEACE

**Social Regulation of Crime.**—As the primary function of the state is the protection of the lives and property of the community through war, it is not strange that a similar function in internal affairs should develop. Attention has already been called<sup>1</sup> to this necessity in connection with the suppression of subjugated races under the jurisdiction of the state, but in other respects state authority grew much more slowly. Long before the state existed men had protected themselves and still felt abundantly able to do so in ordinary emergencies. In all civilizations, groups of men are found united in bonds of real or fictitious kinship for purposes of joint protection.<sup>2</sup> How natural this has become is seen at a glance by observing the numerous fraternal orders of developed civilization. These groups in early civilization were united for purposes of blood revenge, fine payments, and mutual responsibility. The patriarchal family at a later stage answered the same purpose. The loosening of patriarchal family ties through commerce and industry brought about in city life the development of the guild, the guild for social and religious purposes,

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<sup>1</sup> page 4.

<sup>2</sup> For illustrations, see Hutton Webster, *Primitive Secret Societies*.

the trades guild, the merchant guild, and akin to these the orders of knighthood and the brotherhoods of the church.<sup>3</sup> Such associations, found in all civilizations and in all times and places, devoted themselves to the preservation of the peace by restraints placed on individual members, by discipline inflicted on disturbers of the peace, and by presenting a united front against aggressions of unruly members of the community.

**Outlawry.**—But besides associations for the preservation of the peace there were others organized for opposite purposes, associations composed of outlaws, robbers, criminals who had fled from home, men owning no master, worthless fellows for whom no one would be responsible.<sup>4</sup> Against such the united strength of the entire community was necessary. The state therefore developed the function of unifying the force of the community against armed associations of lawless men within its own borders. Similarly, armed resistance to the laws of the community in the form of rebellions, insurrections, and riots, was suppressed through the power and strength of the state. In this way developed the right of the state to suppress such disturbances with a strong hand, if necessary suspending civil law for the time and exercising arbitrary war powers.

**Minor Breaches of the Peace.**—Ordinary breaches of the peace<sup>5</sup> long remained outside the jurisdiction of the state, and even now some offenses against the peace are popularly considered matters to be settled personally, such as offenses against honor, chastity, reputation, and

<sup>3</sup> For special studies of Oriental guilds see articles in the *Yale Review*, vol. ix, pp. 200 and 275, F. W. Williams, "Chinese and Mediæval Gilds"; and vol. vii, pp. 24 and 197, W. E. Hopkins, "Ancient and Modern Hindu Gilds."

<sup>4</sup> See, for example, the Cave of Adullam, I Samuel xxii, 2.

<sup>5</sup> See page 3.

the person. Certain social associations or institutions are still accustomed to exercise slight powers of discipline over their membership, as, for instance, the family, the school, and the church. There are many survivals of private vengeance such as the fisticuff brawl of humble life, the well-nigh obsolete duel of socially higher classes, the use of lynch law administered by outraged individuals of communities, Ku-Klux organizations, and the feuds still so common in backward countries or semipatriarchal communities. All such offenses were once legally avenged by the persons offended, supported by the kinsmen of the fraternity or family. If one slew another, the friends of the murdered man slew the murderer or one of his kin. If injury less than life was inflicted, similar injuries were given in retaliation. This *lex talionis*, or principle of eye for eye, tooth for tooth, had one extremely inconvenient consequence; it was likely to develop into a blood feud. Blood feuds kept the whole community in turmoil, besides robbing the state of many of its best fighting men. Under such conditions the state assumed the office of umpire, examined the facts in the case, turned over the guilty person to his prosecutors for punishment, and forbade the friends of the convicted person to carry the matter further. These, debarred from the privilege of avenging their kinsman, sought the privilege of redeeming his life by payments. Such a compromise in most cases proved eminently satisfactory to all parties. Better pay a fine than lose a friend, and on the other hand a fine received is some compensation for the loss of a friend, and perhaps more satisfactory than blood revenge. The state was also satisfied, by this arrangement, because men that kill in fight make good soldiers in war, and war material of that sort was

too valuable to waste through useless bloodshedding in private feuds.

**The Fine System.**—In some such way developed a system of fines graded for almost every possible offense against the person, from a life to a tooth or a lock of hair, and varying in amount with the social standing of the person assaulted.<sup>6</sup> These fines were paid to the injured person, or to his kin or fraternity, but the state reserved a fraction of the fine for its services as umpire. The income from such fines proved so remunerative to the state that there was a constant tendency to usurp the function of the prosecutor, whose business it was to present the criminal for trial, and to claim an increasing share of the fines. The matter was settled at last by the state's assumption of the entire matter. When a crime takes place, the state arrests the accused, makes all investigations, prosecutes the case, inflicts the punishment, and collects the whole of the fine. The early pecuniary motive of the state has, however, overreached itself, for, in the development of punitive law, other forms of punishment, such as imprisonment, have been substituted for fines in many offenses, and the income of the state has correspondingly diminished, while the expense of administering punishment has enormously increased. Neither the injured person nor his kin now share in the fine, but merely have the doubtful satisfaction of seeing punishment inflicted on the offender. By theory a civil process for damages is possible, but in practice, useless. There are movements in some countries looking to the enactment of a law requiring the state to indemnify the injured person or his kin, on the

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\*For a good illustration of such a system, see John M. Stearns, *Germs and Development of the Laws of England*, New York, 1889.

theory that the state agrees to preserve the peace, and if it fails to do so in any case, it should pay a penalty for its neglect.<sup>7</sup>

**Methods of Trial.**—The state in the development of its functions of arbitration and punishment, has tried many curious experiments.<sup>8</sup> The city of refuge represents an attempt to distinguish between intentional and unintentional murder. The use of the sanctuary is a device for the prevention of punishment inflicted without proper consideration and trial. The ordeal and the judicial combat endeavored to throw the responsibility for the decision on God. The system of compurgation allowed the state to decide prudently on the side that could present more able-bodied men ready to swear to anything to help out a friend (a system not unknown at this day). Torture was regularly applied on the theory that a man in great pain will tell the truth. Finally, excessively cruel and hideous forms of death were inflicted on the guilty under the theory that others would be deterred from similar offenses. Such systems of punishment now survive only in uncivilized communities, and the modern theory of penology is founded on humane principles.

**Crimes against Property.**—A similar development of state authority took place in respect to offenses against property. For a long period theft was considered to be purely a private matter and was settled by methods of retaliation. The injured party would naturally seek to recover from the offender or his kin more than he had lost, so as to recompense him for his trouble. This brought about bad feeling, fighting, and occasional loss

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<sup>7</sup> See, for example, Ferri, *Criminal Sociology*, Chapter III.

<sup>8</sup> See, for illustrations, Henry C. Lea, *Superstition and Force*.

of life. As in the case of personal violence, the state at first acted as umpire and settled guilt and damages, taking its share of the latter. It then gradually assumed entire responsibility in the matter, and now merely returns to the robbed person his property if recovered.

The modern state in exercising its jurisdiction over crime of all sorts is not satisfied merely to detect and punish the offender, but seeks to prevent the commission of crime (1) by carefully framing and publishing the penal law, in order that no one may plead as an excuse ignorance of the law, and (2) by the use of a permanent police force, which systematically patrols the community and seeks to prevent disorder and crime. Even more is accomplished in this direction by wise systems of education and economic regulation and well-being.

**Civil Disputes.**—The next development took place when the state undertook to arbitrate in civil disputes. Disagreements in regard to property rights easily lead on to acts of violence. The state, therefore, in maintaining its function of keeper of the peace, gradually assumed jurisdiction over such disputes by compelling the contending parties to plead their causes before its magistrate and to submit to his decision. In such cases, however, the state seldom takes the initiative, and civil actions are still in form disputes between persons, while criminal actions are in form charges made by the state itself against individuals.

In this development of governmental authority the process is practically uniform; in primitive life disputes of all sorts are settled by private arrangements of the parties concerned, peaceably or violently, according to circumstances or the nature of the case. Then the state from motives of public policy assumes the office of vol-

untary umpire; at a later stage it enforces with the power of the state its decisions, and finally it either compels disputants to refer their grievances to its courts, or it assumes the responsibility of personally investigating grievances and prosecuting and punishing offenders.

This process may be illustrated by the modern strike. This is in form a private dispute between an employer and his employees in regard to the wages paid and the conditions of labor. If the strike should become so important as to threaten violence or serious danger to public interests, the state may prohibit, for example, picketing, or may suggest the use of a board of arbitration, as was done in the coal strike of 1902 and frequently since in mining and transportation disputes. At a later period the state may insist that such disputes be referred to a board of arbitration and, finally, may then enforce the decision of the board.<sup>9</sup> In matters still left for private settlement the state may organize, as is so commonly the case, courts or boards of arbitration and conciliation, the use of which may be voluntary at first, but may ultimately be made compulsory as the state extends its jurisdiction over all disputes that threaten to disturb the public peace.<sup>10</sup>

#### THE FAMILY IN ITS RELATION TO THE STATE<sup>11</sup>

**The Metronymic Family.**—The “patriarchal theory” of the origin of the state was considered satis-

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<sup>9</sup> As to-day in parts of Australasia and Canada.

<sup>10</sup> The use of the injunction in labor troubles illustrates this tendency. The injunction is an order, directed to those who are supposed to be contemplating overt acts, instructing them to refrain from doing such. The danger in the frequent use of the injunction lies in the fact that disobedience is “contempt of court” and may be punished by a fiat of the court, without trial.

<sup>11</sup> See the short work by the author, *The Family in its Sociological Aspects*.

factory down to within a very few years. It assumed an original pair of human beings, multiplying by successive generations into a clan, a union of these into a tribe, and a union of tribes into a nation. This theory of late years has been considerably modified. Researches into the origin of the family show that the patriarchal family came quite late in human history and was preceded by a metronymic stage in which the father played a relatively insignificant part, since the notion of paternity was unknown.

The later family of that stage is frequently known as the totem family, in which form of family a mother supported her own children, aided by her uterine brothers and maternal uncles. These would rank as fathers (protectors) and grandfathers to the children, who were not considered to be related to their natural father nor to his children by other wives. Members of the same totem did not necessarily live in the same horde-group. Each group might contain parts of several totems. A man passing from group to group might probably find totem relations in all, and these were bound together by bonds of kinship and common worship. It was not the totem family that developed into the nation but the horde, or group, that contained parts of numerous totems.

**The Patronymic Family.**—As population increased and the struggle for food supplies became keener, those neighboring hordes that had acquired the art of the domestication of animals held together more firmly for purposes of self-protection. As men came to understand the possibilities in the domestication of animals and in agriculture, there came a demand for slaves and for women as drudges in the household. Marriage by

capture and by purchase became common, and wives so obtained were the property of the husband's family. Since by this time a knowledge of paternity had become common, the male asserted his right to his children and to give them his name, so that the metronymic (mother-named) family slowly became patronymic (father-named). As a man of importance or prowess might easily have many women as slaves in his household, whose children by theory were all his, irrespective as to whether or not he was the actual father, it is evident that a patriarchal *familia* meant a family quite different from its predecessor or from the modern monogamous family. While the patriarchal family was in process of formation, the members of the horde-tribe, composed of several totems, through intermarriage might after many generations truly assert in a general way their kinship and common descent, and would proceed to regulate to some extent the degrees of kinship and property rights. As the tribe broke up into smaller groups devoted to pastoral and agricultural occupations, these groups would become still more solidified and would grow into a clearly defined kinship group (the *gens*), tracing descent to a common ancestor, and bound together by close ties of blood and common ancestral worship. These groups, again, might fall apart into yet smaller groups as village communal life developed, which in turn would be made up of families approximating somewhat to the modern idea of a natural family.

Several matters deserve repetition in this explanation of family development. The totem family itself regulated kinship rights, settled disputes, and acknowledged bonds of peculiar obligation among its own members. The embryo nation, the horde, had no control over the

family as such; it controlled individuals only, irrespective of totem, who happened for the time being to be enrolled in the horde. The patriarchal family also regulated its own kinship rights and relationships and was responsible for the conduct of its members. Its fighting men as such were under the authority of the horde-tribe which represented the incipient nation.

**Types of Family Groups.**—In this way from the totem family and from the horde developed four distinct unities:

1. The tribe, considering its members akin through some remote or fictitious ancestor, and regulating in a general way kinship rights and common worship.
2. The *gens*, a more closely related part of the tribe, having a common ancestor nearer than the joint reputed ancestor of all the *gentes*, and regulating more closely kinship rights and uniting in the worship of the gentile ancestor.
3. The clan, a part of the *gens*, dating back theoretically for at least four generations and practically identical with the ancient village community.
4. The patriarchal family, consisting of a living head, his wives, his subordinate kin, his immediate descendants and their offspring, and his slaves of both sexes and their descendants.

With these developments agricultural life was in full swing, the authority of the tribe and *gens* was relatively lessening and the village might practically be considered a state, as far as the state may be said to have existed in those times. In this case the sovereignty of the state is almost the same as the authority of the father, a paternal authority, however, very different from that of a modern family, in that patriarchal power was a real

authority and was exerted over a much larger group, composed of many who only by legal fiction could be considered as related to him. Unions of clans typified by the *gens*, and of *gentes* typified by the tribe, should in this stage be considered as quasi-confederations, each union not having in itself sovereignty over its communities, but exercising only such slight powers as custom had placed in its hands.

**The Family and the State.**—Obviously, a state in the modern sense could develop only when a village community, or a loose confederation of communities, devoting itself to commerce and industry, became urban and national in type and translated the authority of the father into the authority of a ruler, still the father of the people, but in much the same conventional way as the millions of Russians used to call the tsar their little father, to distinguish him from the Great Father of all mankind. As this stage of statehood developed, the old patriarchal family slowly passed into the classic Roman form, making a distinction between the immediate natural family and the collection of slaves and servitors. The classical notion of patriarchal family in its fully developed form is best illustrated from the *patria potestas* of the Romans. Each head of the family enjoying this power had a voice in the government of the larger community; as a *pater* he was supreme over his own household of wife, children, and their descendants, and was lord, or *dominus*, over his household of slaves and retainers. As the notion of *res publica* developed, private interests became more and more subordinated to the state, which, through a collective body of the most eminent *patres* in the community (the *senatus*), gradually extended its authority. This authority slowly ceased

to be familial, becoming governmental instead, and assumed jurisdiction over the disposition of family property at the death of its head. It regulated succession, the testament or will, kinship rights and responsibilities, and inflicted punishment for debt or crime when public policy seemed to demand it. Increasing emphasis was placed on the rights of the natural as against the artificial family of the patriarchal system, and in later centuries as humanitarian ideas crept in through the influence of Stoicism and Christianity the status and treatment of slaves were improved.

**The Modern Family.**—Though many survivals of the patriarchal system persisted for centuries after the beginning of the Christian era, yet Christian domestic ideals and Germanic customs slowly brought about changes that ushered in the monogamous family of modern times tracing descent through both parents. The church for a time<sup>12</sup> almost supplanted the state in its regulation of the family, and had jurisdiction over marriage and divorce, testaments, kinship, education, and morals. The rise of the modern state, brought about by changes in economic conditions and increase of general intelligence, deprived the church of many of its powers and especially freed the family from ecclesiastical control by the state's gradual assumption of those regulatory functions formerly exercised by the church. Marriage has become civil, divorce is granted, if at all, by the courts or by lawmaking bodies, kinship rights and the will are regulated by law, education is secular, usually compulsory, and largely supported by the state, which also acts *in loco parentis* in case of parental neglect, or

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<sup>12</sup> In late mediæval centuries. See the author's *The Family in its Sociological Aspects*, Chapters V and VI.

incompetency, or of complete orphanage. In other words, the family once anterior to, and independent of, the state, has gradually become by theory entirely subject to the supremacy of the state, which would not hesitate, if public policy seemed to demand it, to regulate the domestic institutions as fully and as effectively as it does economic institutions.

### THE RELATION OF CHURCH AND STATE

**Totemism.**—The influence of the state in matters religious presents a curious line of development. Any permanent phase of human activity will embody itself in a social institution, and the church, using the word in its generic sense, is the institution through which religious activity formally expresses itself. In the later animistic stage, religion, if that term may be applied to savage notions of the supernatural, found its best expression in totemism. The older men of the totem represented the authority of the church. They regulated totem relationship with its system of rights and obligations, instructed and initiated the youth into the mysteries of the worship, interpreted the meaning of the supernatural and sought as medicine men and conjurers to heal the physical and mental diseases of the people. Such a function contains in essence all that the church strove to become in later ages, and its early importance as a civilizing factor can hardly be overestimated.<sup>18</sup>

With the development of patriarchal society totemism disappeared and in its place came nature and ancestor

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<sup>18</sup> For excellent studies of this type of society, see Spencer and Gillen, *The Native Tribes of Central Australia*, London, 1899; J. G. Frazier, *The Golden Bough*, 3rd edition, 10 vols., London, 1907-13; R. H. Lowie, *Primitive Society*, 1920.

worship. The formal part of worship now became the prerogative of heads of families, as far as ancestral deities were concerned, but side by side with these arose a system of nature worship, partly a matter of common superstition and partly a cult with a definite priesthood. Supplementing these systems were seers, soothsayers, magicians, and necromancers, who claimed a more practical and larger knowledge of supernatural beings than the more formal priesthood. The combined influence of these several priestly classes was overwhelming. The entire life of the community was dominated by them, and men became through social pressure religious in thought and action.

**Ancestor Worship.**—The maturity of the patriarchal system marks the height of this influence. During this period church and state were for all practical purposes one in aim and in spirit. Rulers were themselves priests and exercised priestly functions.<sup>14</sup> Both institutions were conservative, loved stability, and taught submission to authority. The church deified the ruler either as himself a god or God's representative, exalted his priestly authority, educated his nobles to obedience, and kept the masses submissive by declaring rebellion to be impious. Consequently, the priesthood became a separate class, a social hierarchy, having large possessions of land, wealth, and special privileges, and exercised an authority hardly second to that of the throne itself. Its leaders were the trusted advisers and assistants of the king. It had charge of higher education and instructed aspiring youth in medicine, sanitation, the known sciences, statecraft, and divine wisdom. It regu-

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<sup>14</sup> See for illustration Solomon's dedication of the temple as narrated in II Chronicles, v-vii inclusive.

lated the morals of the people, condemning or approving social customs, and punishing infringements of its standards. It inculcated the virtues of hospitality, charity, and kindness toward the lowly. It sanctioned wholesome amusements and participated in them, developing for its own purposes the rhythm of the song and the dance, as well as the stately march of the procession and the use of musical instruments. Its connection with family worship gave it influence there also, and through its conservative attitude and educational power it was able to solidify into a static civilization the slowly developing forces of the patriarchal period.

**The Rift between Church and State.**—But this harmony of church and state was sometimes rudely disturbed. The prophetic or inspirational side of religion, voiced by the seer and by the religious reformer, was not infrequently in opposition to the *status quo*, and denounced both ruler and priest for their shortcomings. Then, too, as patriarchal states passed into the age of commercialism, the spirit of the newer age fought against the existing system. As intercourse with other countries developed, there came a knowledge of foreign divinities; worshipers of these resided within the borders of the state, and in many cases the worship itself was encouraged and sanctioned. New influences and broader knowledge tended to destroy unquestioning belief in the older system, and material progress demanded liberalism in state policy. Competition of religious ideas and systems and philosophizing slowly sapped beliefs in national and local gods. Even though the forms of worship survived, confidence in religious teaching and the efficacy of worship disappeared. For the ecclesiastical organization, as a rule, is slow to adapt its teachings to the chang-

ing conditions of the age, its priesthood is a class apart and sees the signs of the times by refracted light. It is inherently conservative and tends to emphasize the permanent and accepted features of life but not to understand the volcanic energy pent up and seeking expression. For such reasons it regularly fails to adapt itself readily to the newer environment, loses its power in consequence and then, after slow readjustments, tends to regain part of the influence lost.

At such crises the truer interests of society may demand that the state supersede the church in many of its activities. The state, in so doing, realizing the authority and prestige of the church over the minds and hearts of men, may continue to allow it large powers and wealth, but by regulation of its organization and teachings makes it a useful ally rather than a rival for supremacy. It may, however, go farther than this; by depriving it of countenance and financial support, it may thereby thrust it into competition with other social institutions, making it dependent for support on popular favor and approval. The period of the Renaissance illustrates this. When the theological tendencies of the church became iron bands restrictive of the growing life within, the state burst these asunder and encouraged science, invention, philosophy, and secular education. It also ignored ecclesiastical teachings in respect to charity, crime, insanity, intemperance, and such social ethical questions, and sought to solve these problems by scientific investigation rather than by theological dogmatism. The result is that the church is no longer looked on as the final authority in such matters; the state, rather, making use of the teachings of science and sociology, has become the authority in fixing moral standards.

On the other hand the church in adversity may turn away from the material aspect of ecclesiasticism and catch glimpses of a world mission, a world empire dominated by religious ideals. The inspiration of such an ideal might even carry the church to victory against the state and render its government theocratic. Such struggles of church and state have been common and victory has passed from one to the other. Sometimes, as in the struggles of church and state in mediæval and modern times, a truce has been declared and the respective powers of each defined, as, for example, in the *concordats* so common in the history of the Roman Catholic Church. Broadly speaking, however, whenever a state passes into commercial-manufacturing life, it tends to emancipate itself from sacerdotal authority and to favor a more or less complete separation of church and state. A separation of church and state, however, does not imply an absolute separation. The church as a social and property-holding institution is still subordinated to the state, but it is left free to regulate its own life and religious practices.

**Separation of Church and State.**—There seem to be four well-defined stages in the accomplishment of this object:

1. The state and church separate in organization, personnel, and function, but work in harmony, as in Russia under the tsars.
2. The state subordinates the church so effectively that it becomes virtually a department of governmental administration, dominated by the ruler and his ministers. This was practically the situation in several of the states of Germany under the Empire.
3. The church frees itself from governmental control

in spiritual matters, but is financially chiefly supported by the state. France in the latter part of the nineteenth century illustrates this system.

4. The church becomes separate from the state and is no longer supported from public funds. This "separation of church and state" may have a friendly aspect, as in the United States of America, or a vindictive one, as in Mexico during the last fifty or sixty years.

**Passing of Religious Functions to the State.**—As already indicated, the church in conflict with the state lost many of its historic functions. As long as it was in sympathy with the state and was supported by it, it mattered little which institution performed social service. But as the two drew apart and public financial support was supplied more sparingly or withdrawn altogether, it became important from the state's standpoint that it, rather than the church, should perform functions so essential to national welfare. Financial weakness also made the church less able to perform her accustomed functions. Slowly but surely, therefore, one power after another passed from the church to the other social institutions or to the state: charity, medicine, amusements, scientific investigation, philosophy, education, domestic regulation, and morals. This change has come more fully in some states than in others, but broadly speaking the power of the modern church tends to confine itself to devotional and spiritual lines only, and other functions are passing from its control. The churches may still advance theories of disease and healing, or scientific and philosophic speculations, and may seek to regulate for their members amusements, morals, domestic institutions, and education, but such religious *dicta* are suggestions,

not authoritative decisions, and are adopted, if at all, because of their inherent reasonableness.

The effect of all this is not necessarily to weaken the church. The older organization, it is true, may be supplanted by a newer and more progressive one, but this should and does result in a deepening of spirituality and a clearer philosophic insight into the meaning of life. Freed from the entanglements arising from the pursuits of material power and wealth, it may devote itself to matters more definitely religious. It may liberalize its theology, spiritualize its teachings, humanize its ethical ideals, and seek to influence men, not as formerly, by emphasis on pains and penalties, but on the beauty of holiness and the ideals of human brotherhood. Experience seems to show that such a church exercises a deeper and truer sway over man's hearts and minds than an ecclesiastical organization wielding what may now be considered as secular functions.

## CHAPTER VII

### ECONOMIC REGULATION

It will, of course, be impossible in an elementary study to trace with any fullness the development of the power and activity of the state in the regulation and control of economic life. It will be sufficient, perhaps, to indicate in a general way what has been the attitude of the state toward the chief factors in economic progress.

#### TERRITORY

**The Ownership of Land.**<sup>1</sup>—The possession of abundant territory for its population is the foremost economic necessity for a state. From the land human beings derive their chief supply of food, or natural wealth which may be exchanged for foods, so that without land no permanent state can exist. From the earliest times, therefore, states have had to devote especial attention to the acquisition and defense of territory. Whatever claim a community might have to land depended at first entirely on possession and use. The strong hand, nerved by the necessity of securing a livelihood, was the only form of title deed recognized. What a community needed for hunting, grazing, or agricultural purposes it used, defending its right by main strength against intruders. If, at a later time, a vigorous community, necessitated

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<sup>1</sup> For studies of the history of property see Section IV of the Bibliography.

which misuses, or only partly utilizes, its territory. In all such controversies, however, the decision between the two rival claimants is generally settled by force of arms, not by discussions of ethical standards. Illustrations of such conflicts may be found in our own history in our dealings with the Indians, with Spain, and with Mexico.

**The System of Mandatories.**—Under the system of mandatories<sup>3</sup> included in the plan for the League of Nations<sup>4</sup> a somewhat different policy is set forth.

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<sup>3</sup> The word *mandatory* emphasizes the notion of trusteeship and is therefore better than *mandatory*.

\* ARTICLE 22.

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than

Recognizing that barbarian, semi-civilized, or backward races inhabit in many cases lands that properly should be brought into close contact with more highly civilized nations, it aims to substitute for the older methods of exploitation and conquest the vesting in some capable state of a trusteeship over the race in need of development, so that the stronger may help the weaker to make more rapid advancement under the guidance and protection of a benevolent trustee, reporting annually to the League respecting the needs and progress of the protected nation. The plan proposed may possibly prove Utopian in this era of racial antagonism, but one may readily grant that the mandatory provision of the League is ideally admirable and some day should be made real.

**The Individual and the Land.**—Under a theory of ownership based on communal use, evidently no individual in a community could claim any particular portion of land as his own. As a member of the community he shared with his fellows what all collectively had. In

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police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

other words, he also had the use but not the ownership of land. In tribal states, therefore, one may expect to find that the tribe will claim hunting or grazing grounds as a communal possession with fairly well-defined borders, but yet its notion of ownership is still a communal ownership based on use. The same statement is practically true of highly developed patriarchal village life in agricultural communities. Village lands as a whole are held by the community, and each recognized member of it is entitled to his share in use, but he may not sell his portion nor dispose of it by will. The shares allotted to the members of the community were not necessarily equal, for the size of the allotment depended somewhat on the social status of the person; the essential point, however, is, that each head of a family was entitled to a share for the use of his family. Naturally, if a family died out, its right of use reverted to the community.

Similar theories of ownership were applied to mines found in the communal territory. These, also, were held and worked for the common benefit. When navigable waters became important, the same theory was applied to them. Members of the community might use the waters as a privilege incident to their citizenship, but ownership was vested in the community, and individual use was subject always to communal regulation.

**Communal Ownership.**—Communal ownership evidently involved much management and administration on the part of the members of the community. Conflicting claims of persons entitled to a share in use had to be adjudicated, allotments made, customs declared, times for joint grazing, plowing, and harvesting arranged, defense provided for and complete regulations for the other innumerable details of administration. If the community

was founded on conquest, the management was probably vested in the conquering lord, his kinsmen, and his immediate followers; if the community represented a peaceable growth from clan organization, then headship would naturally be vested in the heads of families and in their chief or elder. The ruling body held periodical meetings so as to settle such matters as might demand attention. As long as life was simple, agriculture primitive, inventions few, and commerce merely local, such a form of communal ownership and management was eminently satisfactory. This is shown by the fact that the system developed throughout almost all the world and survives yet in modified form in the village communities of India and China and in the Russian *mir* and peasant soviets.

**The Rise of Personal Ownership.**—But in other localities many causes combined to break down this system. (1) If through contact with a wider environment some men developed more energy and greater adaptability than others, and these qualities showed themselves in greater capacity in agriculture, such persons would have a natural disinclination to accept neglected holdings at the next allotment. Only a permanent tenure in use would satisfy, and that step developed naturally among flourishing and populous communities. (2) This tendency was strengthened in those communities which had permanent boundaries by the homing instinct, so characteristic of all higher animal life. Men become attached to the place of their birth and prefer the old and the accustomed to the new, even though there may be a theoretical superiority in the latter. For this reason, also, periodical reassessments of land fell into disfavor. (3) Again, conflicting claims of kindred, arising, for example, through adoption, or a father's personal pref-

erence, frequently must have involved transfers of right to land; or a conquered community might be compelled to transfer permanently a large share of its territory to members of the conquering tribes for individual distribution among the warriors. Such possibilities must have familiarized communities with the thought of an ownership in land that could be alienated, either through communal action or at the wish of the family or its head, and vested in particular individuals.

In later times emphasis on the personal wish of the head of a family, especially when voiced by a formal expression of his will, definitely completed the process. Henceforth a family, through its head, had a claim to ownership in land. It did not simply have the right of permanent tenure, but under certain contingencies it might even alienate its possessions. At a still later period, wherever urban democracy developed, the family as a legal unity tended to disintegrate. Under such circumstances even individuals of the family might personally hold land in full ownership. This is our present theory of land holding. An individual may own land, use it or not use it at his pleasure, or may lease it or sell it as he prefers. Many argue that this tendency has gone too far, and assert that the community should never allow its citizens, and still less aliens, to hold land from use. Such an argument is based on the fundamental proposition that the use of land is essential to life, and that each person who holds needed land out of use thereby defrauds to that extent his fellows from part of the opportunities of life. California goes even farther in asserting that aliens who are not permitted to become citizens (Orientals) should not be allowed to own land even for use, thereby returning to the ancient theory

that the ownership of land should be vested in citizens only. Such theories as socialism and the single tax, for example, favor communal ownership of land, each citizen having the right to use, but not to keep from use, an amount of land suited to the necessities of his family or business. Here, again, as in the case of the territorial claims of states, there is a conflict between an ownership based on a legal theory of property rights and an ownership based on an asserted ethical right, namely, the right of any individual to take possession of unused land if needed for his support and welfare.

**Survivals of Communal Ownership.**—There are still many survivals in modern society of communal ownership. The theory of eminent domain implies that the state has the primary right to the use of lands as against the claims of private individuals. Again, the waters of the seacoast, navigable streams, and their shores are, or should be, communal. The same is true in many states of all waste lands, of mining and water rights, and of unclaimed or abandoned property. The family also still has ownership of all property left by its members who die intestate and divide it among themselves in accordance with rules laid down by customary law. Finally, the rapidly extending sphere of governmental ownership of natural monopolies seems to imply that land and its underground treasures, as essential means of livelihood, may again become communal, not individual, in ownership. The outcome of this clash of rival theories is, of course, still a matter of doubt. Arguments for a tenure based on use are theoretically strong. Land and mining wealth in the possession of the people as a whole is a far stronger guaranty of democracy than its monopolization by the few. In any

case no one can safely deny that the permanent prosperity of any state is fundamentally involved in the wisdom or nonwisdom of its system of land tenures.

**Colonization.**<sup>5</sup>—If population multiplies too rapidly and national boundaries cannot be enlarged peaceably or through war, then migration is and has always been the historic remedy. The spread of population from primitive centers has often been traced. The colonizing systems of Phœnicia, Greece, and Rome are known to all students of classical history, and the movements of Teutonic population in the time of Cæsar and in the early Christian centuries are part of our common knowledge. The invention of the compass, the circumnavigation of Africa, and the discovery of America gave a new impetus to colonization. Portugal and Spain led the way, then Holland, France and England. The policy at first followed was that of exploitation and trade; agricultural settlements came last and were for a time considered least in importance. An era of exploitation as such cannot permanently endure. A firm hold on newly discovered land depends finally on mining, trading, and agricultural centers. The mother country protects and aids in developing such centers in return for trade privileges, good will, and an acknowledgment of supremacy. Political capacity on the part of the colony in time brings autonomy, either peaceably or by revolution. The utility of productive colonies is so manifest that every great state eagerly adds to its colonial possessions, searching the world for places in uncivilized or partly civilized lands suited for trading or colonizing purposes. There

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<sup>5</sup> See Osborn, *Men of the Old Stone Age* for statements respecting the waves of immigration into prehistoric Europe. For studies of colonization see Section IV of the Bibliography.

it establishes a sphere of influence or a protectorate, sends its traders and missionaries and seeks to build up its interests on a permanent basis. The population of the colony multiplies and the civilization of the ancestral home is reproduced in miniature, with such modifications as are compelled by differences in environment. This great colonizing era, which is still vigorous though it has already lasted over four hundred years, is effecting profound changes in political development. The possession of immense areas of fertile land suitable for colonization makes an outlet for a surplus but enterprising population, fosters commerce and manufactures, and strengthens national prestige and power. Tropical areas not suited to white settlement are, as trading centers, made to furnish valuable material for foods and manufactures, sometimes through the labor of "coolies," as in the Guianas of South America or in the Fiji Islands. In consequence, practically all the available parts of the earth have come under the influence of Western civilization, and the great nations are seeking to utilize the respective parts under their sway. The twentieth century is destined to see a mighty expansion of Western population into available centers at present thinly populated, such as Siberia, Australasia, Canada, and the southern part of South America, and scientific knowledge applied to the development of these regions will accomplish in a few years what under ordinary processes would require centuries of time and energy.

On the other hand, the great Oriental nations of China, India, and Japan are straitened in their possessions and are seeking other lands for purposes of colonization. These races are increasingly barred out by the states of the West, thus creating international

complications. Africa, the Americas, and Australia are the large areas as yet only partly developed, omitting Siberia and the western third of Asia, but these all are controlled by European-American states eager to preserve their lands for their own racial stock. No one knows the outcome of this situation though he may surmise the possibilities involved in the struggle of races for survival.

#### AGRICULTURE

**Food Supplies.**—When the population of any region tends by natural increase or through immigration to press too closely on its ordinary means of subsistence, states guided by intelligent leaders have been able to multiply food supplies by scientific devices. Such means now regularly form a large part of governmental activity. Even the early Oriental states developed vast systems of drainage and irrigation for the sake of agriculture, and facilitated transportation by the building of roads and canals. Such works are still carried on in all important countries, either directly by the state or under its supervision and control. In this country we see further extensions of the same idea in the efforts of the government to aid the interests of scientific farming by the support of agricultural schools and by experiments in horticulture, stirpiculture, and in the preservation of foods through canning, and in the importation of useful grains, fruits, and other foods for production in home soils. Increasing attention is given to the preservation of forests and game, such as the reindeer herds of Alaska, to the utilization of arid lands through irrigation, and marshy lands through draining, and to the safeguarding and development of fisheries, the im-

portance of which as a source of food supply is well shown by the international prominence of the fishing waters of Newfoundland, Alaska, and Saghalien. In the Great War states assumed the right to ration their entire population so as to conserve foods and lengthen out the supply as a safeguard against national starvation. Kidd<sup>6</sup> and other writers point to the time when the tropics will furnish nations of the temperate zones with vast food supplies, and these regions are already receiving larger attention from states, as they feel the necessity of multiplying grain and flesh foods for their increasing populations.

### COMMERCE<sup>7</sup>

**The Market Place.**—A great step in the enlargement of the economic function of the state came with the rise of commerce. As bartering between communities became increasingly frequent with the growth of wants, the community had to develop roads and market places. Traders would not venture where robbery was inevitable. Roads must be reasonably safe, and a place for barter set aside whose neutrality would be guaranteed. Such market places naturally were at first on the "marks" or boundaries, or at the junction of much-traveled paths. Here by custom would gather traders and buyers from many communities, secured against robbery and attack by the custodians of the market place, who would exact their fees in return for the privileges they gave. Such a center readily grew into a trading village, different in kind from the ordinary farming vil-

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<sup>6</sup> *The Control of the Tropics*. See also works of Alleyne Ireland, Section IV of the Bibliography.

<sup>7</sup> For works on this subject see Section IV of the Bibliography.

lage. Its customs came to be guarantied by the neighboring communities and these customs developed into the unwritten or written charters of municipalities of later times. In order to facilitate commerce some attention would have to be paid to the building of bridges and roads, which might be utilized also for military purposes. Along such roads passed posts or messages sent by merchants or by the state, as the necessity for frequent communications arose with the development of commerce and administration. If such roads terminated in seaport communities, harbor improvements also might be deemed advisable, and these might be made by interested individuals or by the community itself. In modern days enormous expenditures are made for such public works and the sphere of governmental activity is constantly enlarging through the state ownership of railroads, cables, telegraphs, and the subsidizing of commercial and manufacturing enterprises.

**A Medium of Exchange.**—As trading became important the necessity for some common medium of exchange constantly grew. It became inconvenient to exchange goods in kind, even though that system had developed to perfection by fixing a customary value on everything tangible on the exchange list, from a rude tool to a slave. At first some one staple article was selected and all other things were valued in that. Live stock, such as sheep or cattle, formed such a medium, supplying to us thereby our word pecuniary (*pecus*, cattle). When metals were brought into use, these came to be valuable media for exchange and were accepted by weight in return for other goods.<sup>8</sup> A great idea came into the

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\* The British pound sterling was in Saxon times a pound (troy) of silver.

business world when responsible communities or merchants began to stamp under seal a guarantied weight in specified metals.<sup>9</sup> Such coins passed through definite development in respect to shape, edging, impressions, and solidity of guaranty, and finally the entire matter of coinage was removed from the hands of individuals and communities and centered in the state. The nationalizing of coinage systems and international agreements based on these clearly indicate a high and wide commercial development. In all such cases the metal so stamped is considered to be inherently worth the amount indicated by the stamp. Governments, tempted by the hope of gain or of borrowing money under false pretenses, have stamped as money material not intrinsically worth the amount indicated by the stamp. Such fiat money becomes in effect a note or promise to pay and is of value only in proportion to the ability of the state to give full face value on demand. Illustrations may be found in the debased coinage of mediaeval days and in token money and the paper currency issued by the combatant states during the late war. Akin to this development is the present power of the state in fixing standard weights and measures.

**The Bank.**—As long as wealth consists chiefly of goods in kind, the main problems of economic life center in the multiplication of fertile lands and labor; but when through commerce wealth in the form of money begins to accumulate, a new set of problems arises. Money, of course, may be kept on hand in hidden places against a time of need, subject only to the danger of robbery, a

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<sup>9</sup> For such studies note for example, Alexander Del Mar, *History of the Precious Metals*, and *History of Money in Ancient Countries*.

danger, however, always imminent. It would manifestly be an advantage to the owner if some responsible party, in return for the use of the money, would assume charge of it and return it on demand, or use it and pay interest for the privilege. Furthermore, when a merchant wishes to send money to some distant place in payment of goods bought or to be purchased, he can send it under guard to the place indicated, but at heavy expense and at great danger of robbery. He would be greatly advantaged if some wealthier merchant having branches in both places would accept the money in the one place and agree to pay a similar sum in the other place on demand, making a proper charge for the transaction. From such needs as these developed a system of private banks, which greatly aided the development of commerce through facility of investment and exchange. The failure of such a bank to meet its obligations might, however, prove to be a great hardship to public as well as to private interests. Two governmental policies developed from this possibility, (1) close and efficient regulation of private banks so as to diminish the possibility of loss to innocent individuals and (2) the establishment of national banks, either like the Bank of England or the original United States Bank, or national banking systems like that developed in the United States since the Civil War. By such regulation of banking interests the government brings stability and confidence into the monetary system of the nation.

**Governmental Regulation.**—Along similar principles the state undertakes in highly developed commercial communities to regulate for the public good great business interests like that of insurance and corporations of all sorts, both private and quasi-public. As an addi-

tional aid to commerce a modern state establishes a consular service which it places at the service of its citizens who are abroad or engaged in foreign commerce. It also negotiates commercial treaties with other states so as to develop reciprocal commerce, it subsidizes steamship lines, improves harbors, lines the coast with lighthouses and life-saving stations, builds a navy to protect its shipping, and seeks to safeguard the lives and property of its citizens in foreign countries who are engaged there in business, pleasure, or study.

### MANUFACTURING

**The Skilled Worker.**—In simple primitive communities industrial life was represented by the manufacture of tools, weapons, and household implements, and was almost entirely personal, not communal. To be sure the community was interested in the development of tools and weapons and took a lively interest in seeing that each member had his quota, but the making of these was individual, and individual ownership began in notions associated with personal possession of tools, weapons, clothes, and ornaments. The manufacture of weapons and their own ornaments probably fell to the lot of men; tools for primitive industry, weaving and household implements of all sorts were probably invented by women, on whom devolved manual labor and domestic cares. Each patriarchal household was the center of industry, and the comfort of its members depended on the skill and ingenuity all displayed.<sup>10</sup> With the use of metals much more skill in the handling of tools was

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<sup>10</sup> Note the last chapter of Proverbs, as illustrative of the ancient duties of a "virtuous woman."

necessary. Then developed the smith, first of artisans, parent of many smithing trades and the ancestor of many family names. It is probable that at first skilled smiths wandered about from village to village, gypsy fashion, preserving the secrets of their trade and supplying the demands for better and more efficient tools and weapons. From this parent trade developed in turn the various crafts of later commercial life, each the center of its peculiar industry, and the membership of each bound together in ties of guild relationship, modeled in organization after the clan. As long as these trade guilds, made up of masters and men, were useful and flexible, the state encouraged them with special privileges and recognition of their peculiar customs or charters. When, however, they became too rigid, and failed to rise to the demands of a broader commercial life, they were suppressed, and freedom in industries was adopted as a policy. Under this modern system, after a long era of suppression, trade organizations once more developed in the form of trade unions and federations of trades and industries. The place of these in the state is gradually being settled by judicial decision and legislation.

**The Industries.**—Industries in the larger sense received little attention from the state up to recent times. Monopolies might be granted so as to encourage some particular industry, tariffs placed on imports so as to encourage domestic manufactures and patent rights given in order to encourage ingenuity in invention, but these ideas did not become definite scientific governmental policies until the nineteenth century. Now, if a state wishes to develop its own industries, it may do so by placing tariff duties on all competing goods entering the country. This is virtually an indirect tax on home con-

sumption. If a state wishes to sell to the foreign trade its industrial products, it must reduce duties on those goods that come in exchange for such exports. Industries also may be stimulated by encouraging scientific research and making the benefits of scientific discoveries open to its citizens, or by patent laws granting monopolies in the manufacture and sale of inventions. The multiplication of patents through wise legislation has been one of the greatest agencies in the development of modern capitalism.<sup>11</sup>

### LABOR

In all these forms of economic life, the agricultural, commercial, and industrial, the state rarely used to interfere in the regulation of labor. Slavery and its modified forms of serfdom and peonage were the prevalent forms of labor down to the age of commerce. In the transition from one to the other, regulations of labor were increasingly made by the state but only as it was necessary to define customary law in respect to personal status and property rights. The rise of modern commercial and industrial life brought about a demand for a powerful umpire to mediate between the wealthy and the agricultural, industrial masses. This interference took the form of adjusting the status of the serf and the freedman in the early stage, and in the later stage, of the freeman who was not a landowner, a merchant, nor a master craftsman. As long as class distinctions obtain by constitution, such regulation is necessary whenever a change in status takes place. In democracies, where all men by theory are equal, the government cannot legis-

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<sup>11</sup> For an excellent series of addresses on patents see the report of the "Patent Centennial Celebration," Washington, 1892.

late for or against any particular class but must treat all alike. While this is true of persons it is not true of occupations. Some occupations are distinctly beneficial to the state, others are harmful or likely to prove so under careless management. It is common for all states to encourage the first class by carefully safeguarding their interests; and to prohibit socially injurious occupations entirely, such as certain forms of gambling, prostitution, and, in the United States, the liquor traffic. Some occupations are in themselves necessary but should be performed only by those properly trained. The professions of law, medicine, and the many vocations associated with public health illustrate how the state may insist on a standardized training before the person is admitted to practice. The state also may regulate the conditions of labor for women and children so as to safeguard national health, and for adult males engaged in dangerous occupations.

Late years have brought about a much greater attention on the part of the state to the problems of labor than formerly. It begins to be recognized that laboring interests heretofore have been too much neglected and that a skilled and intelligent body of workers is a great national asset. The change in attitude is shown by the organization of national departments of labor, by the interest displayed in the great labor congresses of recent years, by the rise of political movements among laborers, as in Great Britain for example, and by the recognition of the rights of labor inserted in the plan of the League of Nations.<sup>12</sup>

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<sup>12</sup> ARTICLE 23.

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

Just how much emphasis should be placed on labor interests is a matter of vigorous present-day discussion. Under the individualistic, *laissez-faire* policy of England in the nineteenth century, laborers were left to the mercy of free competition, without the right to combine for joint purposes. The results were disastrous and the chartist movement (1838-9) with its six demands<sup>13</sup> was the turning point towards the newer systems of recognized trade unions. Trade unionism in these days is conservative and finds its radicalism in several forms: first, the Marxian theory that the proletariat masses—the laboring classes—should control government, collec-

- (a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;
- (b) undertake to secure just treatment of the native inhabitants of territories under their control;
- (c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;
- (d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;
- (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;
- (f) will endeavor to take steps in matters of international concern for the prevention and control of disease.

See also, in the Peace Treaty with Germany, Part XIII, entitled "Labour."

<sup>13</sup> The "People's Charter" called for such "impossible" demands as: manhood suffrage, the ballot, parliamentary districts of equal population, annual sessions, payment to members, who should be free from a property qualification.

**PART II**

**ORGANIZATION OF GOVERNMENT  
AND  
DEMOCRACY**



## CHAPTER VIII

### DISTINCTION BETWEEN STATE AND GOVERNMENT

#### **The Danger of Confusing State with Government.**

—Political government has already been shown to be distinct from the governmental organization of the other social institutions,<sup>1</sup> and defined<sup>2</sup> as the organization of the state to which is entrusted the right to exercise the sovereign powers of the state.<sup>3</sup> Properly such an organization should be able to exercise any power whatsoever that may be included under the term sovereignty. Yet this clearly would make the power of the government coterminous with the power of the state and might readily cause a confusion or identification of one with the other. This was common enough in former times and is not unknown in the arguments of many modern political discussions. An autocratic monarch, for example, unrestrained by any legal checks on the exercise of his powers, might well identify himself with the state and assume that in his own personal will were located the full powers of sovereignty. It is not strange, therefore, that modern writers who confuse state and government should denounce the so-called "absolute state," that

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<sup>1</sup> Chapter I.

<sup>2</sup> Page 48.

<sup>3</sup> In Great Britain the term government is used to designate those in charge of the governmental organization, the leaders of the personnel of government.

is, a state having sovereignty defined as absolute power, for to them it implies a government having absolute power, against which the people have no rights, not even the right of revolution.

The danger to liberty in identifying state with government, already discussed,<sup>4</sup> was clearly perceived even in Greek times. In the course of centuries many lines of argument developed, aiming to show how this danger might be averted, and four of these will briefly be explained as illustrative of the situation.

*I. Popular Sovereignty.*—In the government of horde or tribe the capable adult population was the final authority in governmental matters. They were voiced and ruled by elders and chiefs, but important decisions were ordinarily left to the "yes" or "no" vote of the "people" themselves. In such forms of organization the people met in assembly on proper occasions and after listening to the opinions and recommendations of chiefs or leaders would give a decision through words or gesture as to the line of policy they desired to be adopted. Illustrations are common enough, as in the *ecclesia* of the soldiers in Homer,<sup>5</sup> the warrior assemblies of the Germans and the Gauls as described by Cæsar or Tacitus,<sup>6</sup> or the wish and will of the "*Senatus Populusque Romanus*," or the discussions of Indian tribes, so fully described by Morgan in his *Ancient Society*, as well as, in modern times, the *Landsgemeinde* of certain rural cantons of Switzerland, or the gathering of townsmen in old-fashioned New England towns, or in fact in the usual procedure followed in social organizations, when,

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<sup>4</sup> Page 49.

<sup>5</sup> Second book of the *Iliad*.

<sup>6</sup> *Germania* for example, Chapter XI. See also page 293.

for example, an executive committee makes recommendations to the members. In all such meetings there is a recognition of the fact that, after all, the real power in a community should exist, not in the officers or leaders, who are thought of as representatives, but in the adult membership whose fundamental interests are at stake.

This notion was worked out carefully as a political theory by the trained lawyers of the Roman Empire, who argued that ultimately all power resided in the people, who, however, delegated their powers to an emperor, selected by them, who used these during his lifetime for the benefit of the people. At his death the powers reverted to the sovereign people who would then elect another ruler and delegate their powers to him as before.

This great teaching of popular sovereignty remained basal in Roman law, and harmonized well with contemporary Germanic and Anglo-Saxon teachings,<sup>7</sup> so that when in the early modern period, there came reactions against monarchical absolutism, the doctrine of the sovereignty of the people readily came to the front and was the hypothesis on which the important social contract theories of Hobbes, Locke, and Rousseau were based. Unfortunately, as was true of the Roman lawyers and of Hobbes, human casuistry devised an explanation whereby the sovereign powers of the people automatically passed into the possession of an autocratic monarch, so that according to such explanations people possessed a mere dream sovereignty, not the substance of it.

*II. Fundamental Law.*—Again, in the classical ages of Greece and Rome, and also in the Middle Ages,

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<sup>7</sup> For a short summary of these see Stubbs' *Constitutional History of England*, vol. I, especially Chapter II; or see Gummere, *Germanic Origins*.

it was taught that there were certain fundamental principles of right and justice eternal in the universe, revealed by the gods (or by God) to the consciences of men, or thought out by philosophic meditation, or found contained in time honored customs handed down by tradition from antiquity and tested by human experience,<sup>8</sup> that unitedly formed a body of law binding on the consciences of rulers, who, should they violate these, would incur divine wrath and human hatred. Thus Antigone<sup>9</sup> buried her brother against the orders of King Creon because of the higher law written in her heart; and early Christians went to martyrdom obeying God rather than the orders of a heathen government; and the English of Cromwell's time relying upon their ancient customs and the "rights of Englishmen" rebelled against the despotic Stuarts and established their liberties.

In this theory a troublesome factor in the matter lay in the fact that this fundamental law, binding on the conscience of an autocratic king, was religious and moral, not legal, and might not prove a serious restraint to a despot or a tyrant who was in charge of his own conscience and preferred to decide in favor of his own lax interpretation of his obligations to his subjects. The people in such cases, could do nothing but passively submit and await with patience the death of the king or else by assassination or revolution endeavor to bring about changes for the better.

*III. Separation of Powers.*—Another aspect was given by Montesquieu<sup>10</sup> who, living under the despotism of the French Bourbon kings, observed, as he thought,

<sup>8</sup> Like the Roman *jus gentium*, or the common law of England.

<sup>9</sup> See Sophocles' tragedy, *Antigone*.

<sup>10</sup> *Spirit of Laws*, Book XI, Chapter VI, and see page 164 of this text.

in the England of the early eighteenth century, the best of existing European governments in his estimation, a principle of government which has come to be known as the "separation of powers." He noted that the government of England was divided into three well balanced parts, the executive, the lawmaking, and the judicial departments, and that each had its own powers and its own personnel. This separation and balance seemed to him to be the real explanation of England's liberty and hence he concluded that popular liberty in other states might best be secured by organizing government after this principle, including a careful series of checks and balances. The American convention of 1787 approved of this suggestion and incorporated the idea of it in the Constitution, so that the Federal Government of the United States of America is based on this principle. We in these days are by no means so sure that this principle is correct or that it embodies the safest and sanest method of attaining human liberty.

*IV. Marsiglio's Conciliar Theory.*—As a fourth illustration Marsiglio's teaching<sup>11</sup> respecting the church, which was later applied to the state, will be given. Marsiglio was an opponent of the doctrine of Papal supremacy and advocated by preference what is called the conciliar theory. He argued that the whole body of the membership of the Christian Church formed a great unity (*universitas*), a sort of corporation, held together by common beliefs and divine revelations, and that the supreme power confided by God to the church resided in this unity. The proper representatives of this unity, he explained, would naturally voice the power of the unity and would presumably delegate minor powers to a mag-

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<sup>11</sup> In the *Defensor Pacis*, 1324.

istracy with its chosen head. In other words the sovereign powers of the church would be voiced by the General Council of the church, which would delegate powers to the Pope and his administrative assistants.

This argument was promptly translated into political terms and taught that sovereignty was in the collective unity of people, parliament and magistracy—and not in the people considered as a collection of individuals; nor in the parliament, or council, since it was a body representative of the unity; nor in the magistracy headed by the king, since it had merely delegated powers subject to the control of parliament. Magistrates are servants, parliament is a body representative "of the people, for the people," and the people are not the mere individuals who happen to be alive, since the term includes the whole series of citizens of past and coming generations whose interests along with their own should be voiced by the living generation. This was in harmony with the teaching of St. Augustine, that the church is not made up of the existing membership only, but of the saints who preceded and of those who shall be members in later generations.

This argument of Marsiglio's is the basis of the modern theory of the state. The unity which he emphasizes is the state and hence sovereignty is in the state, which is the nation politically organized. It is not in the government, that is, in parliament and magistracy, together or separately, nor even in the people in the sense of the existing population. In every state there will be a government and a people and if the government is truly representative of the people they will coöperate harmoniously. But the will of the state is not the passing whim of government or of people voiced by their electo-

rate. The real will is something fundamental, based on the past and on the present, and on considerations of what ultimately will be best for those of later generations whose interests in anticipation should be consulted. In times of wild excitement, to be sure, the electorate and the government combined might seem to voice the state even with practical unanimity, but when the morning of another day comes there is an "appeal from Philip drunk to Philip sober" and then the real voice of the people speaks.

**The First Written Constitution.**—In recent centuries this notion of a people voicing the real will of the state first came into prominence in the English revolution against Charles I. The Independents, or Levellers, supported by a large part of the army, put forth a series of articles<sup>12</sup> based on ancient customs and political principles, and including newer demands of popular representation, unitedly designed to become a paramount law. This paramount law, when adopted by popular approval, they would have become superior to the will of Lord Protector or Parliament, binding on their actions and basal for all legislation. This proposition, with some modifications, became the world's first written constitution, defining popular rights and determining the forms and powers of the new government. This "Instrument of Government" as it was called, lasted a short time only, passing away at Cromwell's death, but it was cherished in memory and revived in the days of the American revolution, resulting in the American written constitutions.

**Relationship of State and Government.**—Perhaps from these four sets of theory and explanation, the

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<sup>12</sup> See Gardiner, *Constitutional Documents of the Puritan Revolution* for these several documents.

proper relationship of state and government may be seen. The king, as the head of the magistracy (the executive and judicial departments) is never the state and rarely if ever could be considered as voicing the will of the state. If the supremely wise man of Plato or Aristotle were king, presumably he might voice the state, but kings are rarely wise and seldom truly representative. Probably no human being that ever lived was big enough adequately to voice his state, so that personal government is never advisable. Government should be the rule of law not of a man or men. When kings are autocratic, they voice not the state but a ruling class, the interests of the masses being disregarded, so that the presumption is regularly against autocracies and even more so against despotic monarchies.

In the same fashion a parliament does not necessarily represent the wish of the state, because it also may voice a ruling class, an oligarchy, rather than the real state. Even a government elected by a majority of the population is not necessarily a true representative of the state, though the presumption should be in its favor. The majority vote may voice a mob spirit and the minority may by contrast represent the best and most valuable part of the state. The rule of a temporary majority may be fully as despotic as that of any king, just as the extremes of Bolshevism are worse than the worst excesses of any tsar.

An important political problem, therefore, is the problem of trying to form a representative body that may truly be able to formulate the will of the state, since it often happens that the body legally authorized to formulate the will of the state does not fully represent the true interests of the state. In that case we have an issue

between what is legal and what is morally right. If the government is so firmly entrenched that political agitation cannot move it, then the movement may end in revolution, since nothing is really settled until it is settled right. The fundamental will when formulated becomes the constitution, the paramount law, superior to government because it dictates what form government should take and what powers the several parts or divisions of government may exercise. The body that expresses the sovereign will of the state in the formulation of the constitution, whether it be rightly or wrongly constituted, may be called the *legal sovereign* and defined as that person or body of persons having the legal right (and preferably the moral right) to make, revise, or amend the constitution of a state.

## CHAPTER IX

### THE LEGAL SOVEREIGN AND THE CONSTITUTION

#### THE LEGAL SOVEREIGN

**The Constitution of the State.**—If one were carefully to observe in any given state the several divisions of government, and to note the fundamental powers respectively exercised by each, and the manner of such exercise, he would thereby become familiar with the fundamental law, or the constitution of the state. Every state, whether democratic or autocratic, has a constitution. This is not the same as saying that every state has a constitutional form of government, which would imply that the rights of the people were fairly well secured by law against possible governmental tyranny. It is, however, obvious that every state, no matter how despotic or autocratic its government may be, has a form of organization, made up of several governmental divisions exercising sovereign powers, and that these have a well-defined customary way of exercising their powers. Such constitutions may not be written, and in some states are not, yet jurists familiar with any given state could readily write out a statement of what is the constitution of that state, no matter whether its government be an autocracy, a federation, or a democracy. Every state, then, from the moment when it begins its existence has a *constitution*, which may be defined as that

fundamental law or body of laws, written or unwritten, in which may be found (*a*) the form of the organization of the state, (*b*) the extent of power intrusted to the various agencies of the state, and (*c*) the manner in which these powers are to be exercised.

**The Constitution as the Expression of Dominant Interests.**—Such a constitution regularly voices the will of the dominant part of the community, *i. e.*, that part which contains the strength, wealth, and intelligence of the nation. The persons who compose this dominant part will not necessarily themselves formulate the fundamental law of the state, but by formal appointment or tacit consent they will permit some person or body of persons to make provisions for the framework of the organization of the state and the powers to be exercised by its several agencies. In a well-ordered state the constitution will fully and exactly voice the wish and will of the entire community, but generally that is rather the ideal than the rule. In practice the constitution will represent, as already said, the will of the dominant part of the community, often to the neglect and even to the injury of the interests of the other members of the body politic. The aim of democracy is to develop a constitutional system voiced in the composition of the lawmaking body that will allow all the interests of the nation to be adequately provided for in the constitution. Whether these interests can best be voiced by polling the individuals of the nation, or by devising some system of representation of interests, or by seeking to combine for joint action both people and representatives, is still a matter of discussion. Modern democratic movements working toward some system of minority or proportional representation illustrate one aspect of this question. The

Russian principle of "all power to the Soviets," or the "interests" theory of guild socialism or syndicalism, are modern movements aiming at a more complete expression of state will than is possible in many modern systems of government.

**The Legal Sovereign.**—As a state in the exercise of its sovereignty may have occasion from time to time to amend or even to revise entirely its constitution, so as to adapt its life to newer conditions, there must be in every state a person or body of persons recognized as having the legal right to perform such a function. This agency of the state voicing its will in the enunciation of its fundamental law, is the legal sovereign. The legal sovereign, then, in the exercise of its power decides the form of the organization of the state, assigns powers to the several departments of government, and may prohibit the exercise of some powers or designate the manner in which the several powers assigned must be exercised. It may even specify the manner in which it will exercise its own powers,<sup>1</sup> but such specifications must be considered as constitutional guaranties, not as permanent limitations on its activity. In other words, the legal sovereign voicing as it does the absolute sovereignty of the state cannot legally bind itself not to exercise any part of sovereignty. It may give a formal pledge in the nature of a limitation of its powers, but the binding force is moral, not legal; in case of real necessity it should disregard its formal limitations lest the state die through the "dead hand" of obsolete precedents. A legal sovereign unable to perform its sovereign function would be limited in its powers, and hence not the agency through

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<sup>1</sup>The Amending Article of Constitutions. See, for example, Article V, Constitution of the United States of America.

which the state enunciates its fundamental wish—the constitution.

In exercising this great power the legal sovereign should represent the will of the nation, and, as a rule, it does more or less fully voice the desires of the people as a whole. As, however, the conditions that determine the development of states are constantly changing, a legal sovereign designed in one age to express the will of the body politic, may in a later age fail to represent correctly that will. In such a case if the legal sovereign of its own accord fails to modify its composition, or the fundamental law, so as to suit newer conditions, a revolution will probably take place after a period of dissatisfaction and agitation. This is the so-called right of revolution, the right of a community which finds itself hindered in development by existing forms, to overthrow these and substitute others more in accordance with the will of the community. Such a right must, of course, be justified on moral grounds; legally speaking all revolutions are rebellions and in violation of law.<sup>2</sup>

**Location of Legal Sovereignty.**—In old-fashioned monarchies the legal sovereignty will naturally be found vested absolutely in the king, or in the king and his council, under the theory that these truly represent the larger interests of the state. In such cases the king, or the king and his council, may alter at will the fundamental law of the land. The inertia of custom and the fear of revolution or assassination may deter the king from making unpopular alterations, but if any changes at all are legally to be made, he is the proper agency to decide on and to

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<sup>2</sup> Note the first two paragraphs of the American Declaration of Independence; but for a legal basis for rebellion see Article 61, *Magna Charta*.

enunciate them. The modern constitution of Japan, for example, came as a grant of privileges from the Emperor to his people. If in such a state a representative council or a legislature should develop, this body may gain the right to share in the exercise of this power, and the three bodies, king, council, and legislature would then form the legal sovereign, as in England.<sup>3</sup> In a similar manner the powers of the legal sovereign may pass entirely from the head of the state to the lawmaking body, as in France, or to the lawmaking body and the electorate, as in Switzerland. In a federative form of government, the federal lawmaking body, combined with the lawmaking bodies of the federated commonwealths, may constitute the legal sovereign, as in the national system of the United States of America. If the state be completely democratic, the electorate alone would exercise that power. This stage has almost been reached in Switzerland, through the use of the initiative and the referendum, and in the commonwealths of the United States of America through the use of a democratically organized constitutional convention.

In respect to legal sovereignties located in lawmaking bodies, as in Great Britain, France, and the United States, it might properly be maintained that the electorate also should be considered as legally a part of the legal sovereign, so far as it has the right to determine by election the membership of the parliament or legislative body. This would certainly be true if the electorate had also the right of instruction and of recall. If, however, the lawmaking body, when elected, has full discre-

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\* That is, the king in parliament; the ancient council has become the House of Lords, and the members of the modern cabinet are also members of parliament.

tion in respect to its policy, irrespective of instructions from constituencies, it may be better, on the whole, to consider that body for all practical purposes as the legal sovereign.

In an absolute form of government the personal sovereign will also be the legal sovereign, but the double aspect of the sovereign under such conditions is clear. Similarly, if a legislature happens to be also the legal sovereign, it is possible to distinguish between the legislature as a constituent and as a legislative body.<sup>4</sup> Likewise, in a democracy the electorate is the legal sovereign only when it directly exercises the powers of the legal sovereign. In the national system of the United States of America, for example, the electorate is not legally sovereign, for the Constitution vests the power of amendment in the national Congress and the legislatures of the forty-eight commonwealths. The electorate may request these to pass amendments, but has no power to command them so to do. Theoretically, these lawmaking bodies might at their discretion change the republic into an empire or into a socialistic form of government, without consulting at all the wishes of the electorate. The same illustration might apply in the case of Great Britain. The legal sovereign is the King in Parliament, and action taken by this body is legally final, irrespective of the wishes of the electorate.

In a study of the practical workings of government, one may see that an autocratic ruler will make no important change in the Constitution without first consulting his advisory officers; that the will of the King in

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<sup>4</sup>In the United States the President, for example, may veto acts of Congress, but he has no veto power over amendments to the Constitution passed by Congress.

Parliament may be virtually expressed by the leadership of a dominant political party in the House of Commons; that American lawmaking bodies will carefully consult popular wishes before passing constitutional amendments; and that countless other restrictive influences are brought to bear on the personnel composing the legal sovereign. Such matters of practical politics must be carefully studied before one can fully understand the political system of a state, but after all there is a wide difference in idea between the legal right to accomplish constitutional changes, and the sum total of all the factors and motives that may enter into the formulation of such changes.

**Revolutionary Origin of the Legal Sovereign.—** The legal sovereign often has a revolutionary origin, and may frequently undergo changes in composition. For instance, the legal sovereign in the American Colonies before 1776 was the King in Parliament.<sup>5</sup> The Declaration of Independence and the action of the Colonies made these from the American standpoint free and independent states, held together loosely in a confederation. These states in congress assembled agreed to adopt a constitution, provided all the states gave their consent. When this had been accomplished, by 1781, the legal sovereign of the confederation was the several states acting formally through the Congress by unanimous consent. When revision became urgent, the Convention of 1787, knowing the impossibility of securing unanimous consent to the proposed Constitution, suggested that it go into effect provided nine of the thirteen states gave their consent. The adoption of this suggestion and its accomplishment amounted virtually to a peaceful revolu-

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\*Or, as argued by some, the King in Council.

tion and the establishment of a new legal sovereign. The Constitution adopted, however, provided that future alterations should be made by the joint consent of Congress and of the legislatures of the States,<sup>6</sup> or of conventions especially called for that purpose. This constituted, therefore, a new legal sovereign, so that at the present time no legal amendment or revision of the national Constitution is possible, except by the joint action of these lawmaking bodies.

**The Constitutional Convention.**—In most of the commonwealths of the United States of America Rousseau's theory that the people should legally secure themselves against governmental tyranny has found full development. The early practice of the commonwealths was to assume that the legislature or assembly had constituent as well as legislative powers, but this ran counter to the rising tide of democracy. The importance of a written constitution embodying a fundamental law superior to the statutes of a legislature, and hence made by a body apart from the legislature, was soon recognized. In order that the electorate voicing popular interests might more completely control this law, the constitutional convention was brought into use and developed. This agency, elected directly by the voters and submitting its work to them for approval, has proved remarkably efficacious in securing popular rights. The effect of it is that, whereas in the national system legal sovereignty inheres in the lawmaking bodies of the Federal Government and the States, in most of the commonwealths themselves the fundamental law is controlled by the electorate, through the convention and the referendum.

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<sup>6</sup> By a vote of two-thirds of each House of Congress, and of the legislatures of three-fourths of the States. Article V.

In consequence, the real development of American democracy should be studied, not so much in the national system, as in the local systems of the States, which illustrate much more clearly the virtues and defects of a popular democracy.<sup>7</sup>

### THE WRITTEN CONSTITUTION

**The Importance of Constitutions.**—Since the function of the legal sovereign is to formulate the constitution or to revise or amend it, it may be well to explain more fully the importance of the constitution as the basis for governmental organization, stressing in illustration the written constitution. In the Revolutionary period of the United States of America the dangers inherent in a too powerful lawmaking body were recognized, and steps were taken to provide a remedy. The chief device evolved for this purpose was the written constitution, representing a new development in legislation. The origin of this idea seems to be threefold.

I. *The Contract Theory.*—In all confederations, ancient and modern, there is need for a sort of formal compact, which may or may not be written, in which will be set forth the purpose and organization of the confederation and the powers intrusted to it. The same principle is seen in the charters granted by King, proprietor, or trading company to those colonists who settled along the Atlantic coast. The idea also is found in the constitution of the New England Colonies adopted by the Confederation of 1643-1683, and in the abortive union of the Albany Convention in 1754. The essence of this notion is very like a treaty. Parties somewhat suspicious

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<sup>7</sup> See the author's *Growth of American State Constitutions*.

of one another's motives and anxious to retain their rights, yet desirous of securing themselves as much as possible against common dangers and stimulated by the hope of greater power and importance through unified policies, form agreements and, for the sake of greater security, place them in writing. This idea is plainly seen in the American Constitutions of 1781 and 1789, and finds modern expression in such documents as those of the German Republic and in Australia or the Union of South Africa. Naturally, the contract theory of the eighteenth century powerfully stimulated the formation of such compacts or contracts in the American Colonies.

II. *The Constitution as Fundamental Law.*—In ancient and mediæval discussions of law there was a constant assumption of a fundamental law, as distinct from the petty ordinances or ephemeral legislation demanded by daily exigencies. This fundamental law was thought of sometimes as divine, revealed to man for his guidance; or as cosmic principles of right and justice, eternal in the universe; or as basal customs, wrought out through many generations of human experience.<sup>8</sup> Unitedly these would form a body of law, fixed and immutable, in contrast to the constantly changing content of tyrannical whim or the votes of the fickle multitude.

III. *The Constitution as a Check on Government.*—The third notion involved in the written constitution is that of a check on the powers of government, so as to prevent possible despotism. This idea also derived much of its strength from the famous contract theory of modern times. Its early development in this country may be traced to the Mayflower Agreement (1620) and to the

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\* See pages 121-122.

Fundamental Orders of Connecticut (1639). The idea can be traced in England from the Revolution of the seventeenth century under Cromwell. At that time, as already partly explained, the radical wing of the revolutionary party insisted that there should be adopted a fundamental law, paramount over Parliament, containing in it provisions safeguarding the rights and liberties of Englishmen and providing for the organization of a government after a plan set forth in the constitution. This demand culminated in the adoption of the first written constitution, the Instrument of Government, which was put into operation in 1653 but was soon modified and finally disappeared at the Restoration.<sup>8</sup> This idea of a fundamental law, however, continued to be discussed in political writings and was well known in America through the works of Harrington and Sydney. It found its way into the early constitutions, along with other restrictions on government in the form of "bills of rights." Then, as the tyranny of legislatures became manifest, Massachusetts hit on the happy expedient of summoning a special convention made up of elected delegates authorized to draw up a constitution which, when prepared, would be submitted to the electorate for their approval or rejection. Thus, by making the revision of a constitution through a convention coöperating with the wishes of the electorate, there was secured a law above the legislature, which body would, in fact, be bound by the provisions set forth in the constitution. This combination of convention and electorate should naturally approximate quite closely to a true expression

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<sup>8</sup> See Borgeaud, *Rise of Modern Democracy*, for an interesting account of its history. Also Gooch, *History of Democratic Ideas in the Seventeenth Century*.

of the will of the state. From that time the constitutional convention has been a popular instrument whereby checks and restrictions of all sorts may be placed through the constitution on the powers of the several departments of government.

### **Growing Importance of the Written Constitution.**

—Since the American Revolution, the written constitution has become increasingly important as a factor in political development. Its use in political systems is constantly growing, whether in the form of a treaty compact or a statement of fundamentals or regulation of governmental powers or of all these combined. It passed to France also in the Revolutionary period, and spreading from these two great centers of political influence, the written constitution has become the form of fundamental law throughout all of the Americas, in Japan and China, and in most of the states of Europe. The written constitution may, as in France, consist of a very few fundamental provisions, too important to be treated as ordinary legislation, or may consist of a practically complete statement of fundamentals, as in the national Constitution of the United States of America, or, as in the commonwealths of the American Union the provisions of the constitutions may be elaborated in great detail.

**American National Constitution.**—In the United States the national Constitution differs in several respects from the constitutions of the forty-eight commonwealths. It provides for the organization of a Federal Government of three divisions, legislative, executive, and judicial; it assigns powers to each of these and to some extent regulates procedure, as, for example, in respect to the veto. The assignment of these powers is

based on Montesquieu's theory of the separation of powers, there being three sets of officials, each having its own proper set of functions, and all united by a check and balance system. The Federal Government may use no powers not expressly assigned or implied from those assigned.

**Constitutions of the Commonwealths.**—As for the commonwealths (States) they may use all the remaining powers of the United States of America, omitting, that is, those belonging to the Federal Government, unless in the national Constitution there are prohibitions on their use, as, for example, the prohibitions contained in Article I, Section 10.<sup>10</sup> This statement of the sphere of powers is contained in Article X of the Amendments which reads :

The powers not delegated to the United States [the Federal Government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

In the American system, therefore, the national Constitution specifies what powers may be used by the three usual departments of government and delegates the remainder with some exceptions to the States. Each of these in its constitution provides for the organization and powers of its three departments and defines who shall compose the electorate. Any changes in the system can be made only by revision of or an amendment to the national Constitution. The advantage of this system

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<sup>10</sup> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

is obvious. If the Government had full sovereign powers, it might easily become autocratic and despotic. But since the Constitution specifies just what powers the Government may use, it is equivalent to a sort of guarantee that the Government will be on its good behavior. By theory no division of Government should transgress the bounds set for it; such action would be illegal and revolutionary.

**The Amendment of Constitutions.**—The inconvenience of reserving powers that cannot be used by the Government in case of necessity, such as the prohibitions on the States, is met by providing in the national Constitution a set procedure in accordance with which amendments or even complete revisions may be made. The length of time needed to make such alterations gives opportunity for discussion, and the necessity of the change, therefore, must become clearly manifest. If in time of war or great danger a reserved power must at once be brought into use, and the crisis does not allow time to make the necessary amendments, then probably the Government would, under the war or police power, exert any authority needed, and after the crisis would presumably revert to former conditions. Then, if necessary, the Constitution may be amended at leisure.<sup>11</sup>

From one standpoint the most important part of a written constitution is the provision regulating its amendment and revision. If such a provision is lacking, then the written constitution hardly differs from a statute and presumably can be amended, revised, or repealed by the ordinary channels of legislation.<sup>12</sup>

<sup>11</sup> Lincoln's Emancipation Proclamation, followed by the Thirteenth Amendment, is a good illustration of this process.

<sup>12</sup> Italy's Constitution, for example, is of this sort.

**Amendment of State Constitutions.**—In the early American written state constitutions such an omission was common, but as the importance of a written fundamental law became manifest, provisions were inserted which authorized the ordinary lawmaking bodies by special procedure to make amendments. This special procedure involved greater deliberation and a larger vote for the passage of amendments, under the theory that a fundamental law should be changed as little and as seldom as possible. Legislatures occasionally have used commissions, authorized to make recommendations of amendment for legislative consideration.<sup>13</sup> As popular democracy developed in the United States of America, it was held that not merely the representatives of the people but the people themselves should have a direct voice in the amending of the fundamental law.<sup>14</sup> This brought about the submission of amendments by referendum to the electorate for their approval or rejection. Experience also showed that legislatures were not always eager to initiate amendments, especially if such amendments tended to deprive them of power; hence came the further provision that constitutions should be revised, not by legislatures, but by a convention especially called for that purpose. As it might be possible for a legislature to refuse to call a convention, or to arrange its composition in such a way as to defeat popular demands,<sup>15</sup> provisions were later inserted in some constitutions that a convention should be called at stated intervals, or that a referen-

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<sup>13</sup> See Index of author's *Growth of State Constitutions* under heading, Commissions.

<sup>14</sup> For the use of the initiative and referendum in the amending of constitutions, see pages 300-302.

<sup>15</sup> The Connecticut Convention of 1901 is an illustration of this point. See *Growth of State Constitutions*, p. 102.

dum be submitted asking whether a convention should or should not be called, and providing also that, if called, the membership should be arranged on the basis of population. By such devices the convention has in many commonwealths of the United States of America come to be an agency through which the electorate may (1) outline the framework of government and delegate powers to the several divisions, and (2) issue mandates to their delegates in the legislature instructing them to pass needed legislation. In this way the constitutional convention has become a most efficient means of enabling popular demands to control legislation. This tendency toward democratic influence has been aided by a lessening of the rigidity of the process of amendment so as to allow constitutional provisions to be inserted with comparative ease. As a rule, in the commonwealths an amendment may now be passed by a two-thirds vote of both houses of the legislature and a majority vote of those voters voting thereon when submitted by referendum.<sup>18</sup> By contrast, the amending clause of the national Constitution is so rigid that the document is difficult of alteration. Only seven amendments have been made since 1804, and three of these were forced through during the period of reconstruction.

**Usual Provisions of State Constitutions.**—The written constitution of the commonwealths regularly has a preamble or statement of reasons and purposes, an enacting and a ratifying clause and a schedule or section embracing provisions of temporary importance. The constitution proper may contain, in addition to the organization and powers of the three divisions of government, a bill, or declaration, of personal rights in life and

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<sup>18</sup> See *Growth of State Constitutions*, Chapter XI.

property guaranteed to citizens. Such rights thereby become restrictions on the government and prove a safeguard against tyranny. In the American system the best formal statements of such rights may be found in the constitutions of Virginia and Massachusetts. The length of constitutions naturally will vary with conditions. The bare framework of government can be set forth in a few hundred words, but it may be elaborated in detail for prudential reasons, so as virtually to include everything seemingly important. Details of organization, long series of limitations on governmental powers and mandates of all sorts may lengthen out the document interminably. The present Louisiana constitution, for example, consists of over forty thousand words. The constitution of the State of Oklahoma is nearly a third larger. This tendency is not due to a failure to appreciate the distinction between fundamental and ordinary law, but is due to a widespread distrust of the legislatures. The remedy is not necessarily to insist on the reduction of the length of constitutions, though that should be done, but to improve the quality of legislatures, so as to render unnecessary so many checks on their powers.<sup>17</sup> These bodies now find themselves limited in power and restricted and regulated in every possible way by constitutional provisions which they cannot override. This tendency, if it continues, will result in making the convention the really important legislative body, leaving to the assembly the power merely to work out in detail the principles set forth in the constitution. In other words, the assembly will become a sort of department of administration especially set apart for the formulation of ordinances.

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<sup>17</sup> See *Growth of State Constitutions*, Chapter XXI.

**How a Constitution is Made.**—In the making of a written constitution, the constitutional convention, an especial body chosen for that purpose, is usually employed. But there are exceptions. England makes no distinction in procedure between constitutional and ordinary legislation, so that either sort of law is made by act of Parliament. In Japan the constitution came as a grant of powers from the Emperor to his subjects, as was the case also in the Russian constitution of 1906 under the tsar. In France the bicameral assembly meets as a unicameral national assembly and with special procedure acts on constitutional changes. These are not submitted to referendum. The German Republic held a constituent assembly at Dresden, February 6-July 31, 1919, for the formulation of the present constitution, but this was not submitted to the electorate on referendum but became effective by executive order on August eleventh. In the national system of the United States of America changes are effected by the lawmaking bodies of the Federation and the commonwealths. Such changes, however, are not subject to executive veto, as in the case of ordinary legislation. These illustrations indicate possibilities in the practice of states, but, broadly speaking, the convention, made up of popularly elected delegates, chosen for the special purpose, is the usual modern agency for effecting changes in constitutions.

**Conflicting Theories as to the Powers of the Constitutional Convention.**—The constitutional convention is so important a body that two conflicting theories have developed in respect to its powers.

(1) The convention as an agent of the state is a body whose powers are limited by provisions in the constitution, and by the statute providing for its organization it

also must submit its work to the electorate for approval or rejection.

(2) The convention is the embodied sovereignty of the state, acting for the people and in the name of the people in formulating a just system of government. Hence the convention is for the time being the people itself, unfettered by legislative injunctions, and hence may, if necessary, promulgate the constitution, when made, on its own authority, without reference to the electorate.

The second theory was especially prominent in the earlier history of the Latin-American states and of the commonwealths of the United States of America. It was necessarily so in order to counteract the autocracy of legislatures or executives and is still useful when legislatures seek to obstruct political changes. It is, however, gradually yielding to the other more conservative theory. The convention, as such, is one of the several agencies of the state, called into existence by law and subject to constitutional and, to some extent, even legislative regulation. It has the usual powers of a lawmaking body over its membership and procedure, and has its only function in the revision or making of the fundamental law. The constitution, however, when completed, is never submitted to the legislature for approval, but directly to the electorate through the proper officers of the state.<sup>18</sup>

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<sup>18</sup> For a history of the Convention see John A. Jameson, *The Constitutional Convention*. Note also Charles Borgeaud, *Adoption and Amendment of Constitutions*; this discusses foreign as well as American constitutions.

## CHAPTER X

### THE CLASSIFICATION OF GOVERNMENTS AND FUNCTIONS OF GOVERNMENT

#### CLASSIFICATION OF GOVERNMENTS

It used to be common to speak of the classification of states, owing to the former confusion of state with government. But in modern theory each state is like every other state, being a sovereign political unity, so that not states are classified but their governments, which, of course, may differ widely in their forms.

It will be recalled that the organization of the war band was probably the beginnings of political government. A war band necessarily is autocratic in type. In a civilization characterized by frequent wars the war chief, with his council of minor chiefs, all selected presumably for their qualities of bravery and leadership, would ordinarily have little time for protracted discussions, or for polling his followers for opinions as to a proposed line of action. Quick decisions, proclaimed, enforced, and obeyed would characterize that sort of government. War organizations, therefore, then and now tend to develop centralized forms of government and to concentrate power in the head, or executive, who would have authority to utilize the full strength of the group in defense or offense. Such a system does not require a lawmaking body so much as a council composed of wise

councilors and skilled leaders in battle, supplemented by priestly officials able to bring to the warriors the help and guidance of the gods.

In peaceful times other organizations than that for war would come to the front, such as the economic, the familial, or the religious, and in these leisurely discussions as a basis for decisions would be much more feasible. In such civilization leadership would tend to center in the heads of tribes, clans, and in powerful patriarchal heads of families, having control of flocks and herds; or in owners of landed estates; or in wealthy merchants when commercial activities were prominent. Power, therefore, would become diffused or decentralized, discussion would be permissible, and public opinion would have greater weight in the reaching of decisions. In other words war organizations tend towards autocratic kingship or monarchies and peaceful civilization tends towards democracy, through the intermediate stage of aristocracy, or oligarchy.<sup>1</sup>

**The Greek Classification.**—Distinctions of this sort were observed quite early in studies of government and many attempts were made to classify governmental forms into a satisfactory system. The Greek classification, usually assigned to Aristotle,<sup>2</sup> is the best known of these. It divides governments into monarchies, aristocracies, or democracies, and their perversions, according as the location of sovereign power is legally in the hands of one, few, or many. This classification was excellent in those centuries and Aristotle's discussion is still a classic in respect to ancient forms of government. For modern

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<sup>1</sup> For Herbert Spencer's discussion of this point see his *Principles of Sociology*, vol. ii, Part V, "Political Institutions," Chaps. XVII-XVIII.

<sup>2</sup> *Politics*, Book III, Sec. 7.

times his classification has become useless because of the many differentiations of government in late centuries. It is impossible, for instance, to consider as similar the monarchies of Japan, Great Britain, and Spain, or the republics of France, Germany, Mexico, Switzerland, and the United States of America. Such a classification does not classify. Furthermore, since the development of modern democracy, the form of government is often radically different from its spirit. Great Britain is in form a monarchy, but is in fact a representative democracy, and Mexico, which is in form a democracy, is in fact a close oligarchy. This divergence between theory and fact and the development of newer forms of government since the time of Aristotle, such as systems of popular representation and of federation, to say nothing of the Soviet type of Russia, make it difficult to devise a satisfactory classification.

In a classification based on the spirit of government the government may, for example, be characterized as *despotic* if rulers are guided by personal whim rather than by custom or law; or *autocratic* if governmental power is actually concentrated into the hands of one person; or *constitutional* if the government is guided in its actions by well established principles of law securing rights to its citizens. The terms *conservative*, *liberal*, *radical*, are also employed in the usual meanings generally assigned to those words.

Again, a government may be characterized as *aristocratic* if governmental power is in the hands of a relatively small part of the population who nevertheless govern on the whole for the general welfare. If a few govern mainly in their own interest, disregarding the general welfare, the term *oligarchy* might better be used. If a

relatively large part of the population control government and govern in the interests of the general public that is called a *democracy*; but if the many are class-conscious and oppressive to the minority, then the terms *mob rule* or the *rule of the proletariat* or *ochlocracy* are employed.

**Classification by the Extent of Popular Control.—**

A practical system of classification can also be obtained by noting the degree of popular control in the nation. This may be indicated in several ways:

(1) By noting the ratio of the electorate to the whole population. A system of unrestricted manhood suffrage would approximately give one voter to every four and one-half persons in the population, or about forty-five per cent in the case of adult suffrage.<sup>3</sup> As the ratio rises or the per cent decreases, the government is presumably less popular. In some of our Southern States, owing to restrictions on suffrage, and without women's suffrage, the voting population is less than ten per cent.

(2) If the government is representative, the basis of representation in the membership of the lawmaking body may be noted. This basis may be hereditary right, or a right based on office-holding, or a right based on wealth; or localities irrespective of wealth or population may be represented equally; or equal masses of population may form the basis of representation.

(3) Possibly the clearest idea of the spirit of government may be had by noting the body that has the legal right to alter at will the fundamental law of the land. This body, the legal sovereign,<sup>4</sup> may be composed of the

<sup>3</sup>In New Zealand, with adult suffrage in a population having a low birth rate, the ratio of votes to population varies from 55 to 60 per cent.

<sup>4</sup>See preceding chapter.

electorate, as in Switzerland, or of a lawmaking body, as in Great Britain; or may be in the hands of an hereditary ruler, as in Japan. Under such a classification the ancient Greek terms might again be found useful, and governments be classified as in spirit monarchic, aristocratic, or democratic, or the perversions of these, namely, despotic, oligarchic, or ochlocratic, according as the power of legal sovereignty is in the hands of one, few, or many.

**Classification by Form.**—As a classification by form, governments may be classified as *monarchies* or as *republics*, by noting whether the head of the government be hereditary or elective; or, again, as *centralized* or *decentralised*, by noting whether the national government exercises a close supervision or control over the administrative systems of local bodies politic, as in France; or a slight, almost nominal, control, as in Switzerland or in the commonwealths of the United States. The English system represents a type intermediate between these two extremes, since it regulates its local bodies politic quite fully by general law but by custom allows them large autonomous powers. A republican form of government, furthermore, may be called *direct* or *indirect*, according as the policy of the state is determined in the main by the direct decisions of the electorate itself or by the decisions of its representatives.

**Federative Forms.**—As an additional classification by form governments may be considered as *unitary* or *federative* (composite) :

(1) In unitary forms the local bodies politic that unitedly make up the national body politic, obtain their governmental power directly or indirectly from the national government and are consequently entirely under

its control. In the last resort the national organization has the legal right to determine the forms and powers of all local government. It may not use this power fully and may even delegate large autonomous powers to local government, as in England, but should the necessity arise it has the right to modify or recall these at pleasure.

(2) In federative, or as some prefer to say, in composite forms, the several commonwealths that unitedly make up the national body politic, have a constitutional right to certain governmental powers and hence their rights cannot legally be modified by the national government without the consent of the commonwealths themselves. The numerous federal governments of modern times should be classified under this head.

The extent of autonomous powers held by the commonwealths depends, of course, on the constitution. They may be so largely autonomous that the uniting bond may resemble a treaty among sovereign states rather than a constitution. In such cases the commonwealths really are sovereign states united into a sort of league, forming a loose confederation, to which is delegated such powers as may seem expedient. If, on the other hand, the unity established is so powerful that the parts obviously lose their sovereignties, which become merged into the sovereignty of the Union, then we have a federation rather than a confederation. The right to secede and resume sovereignty or the denial of the right, is the best criterion in case of doubt.

'Akin to confederate forms of government are unities of sovereign states organized for special purposes, such as treaty alliances, like those of the Central Powers in the Great War, or the Allied Powers in opposition; or, again, international unions such as the League of Na-

tions, or The Hague Tribunal for the settlement of international disputes, or the Postal Union for the regulation of postal service throughout the civilized world.

In future years, as nations come in closer peaceful contact, governments will probably develop fundamental likenesses through conscious and unconscious assimilation and imitation, and at that time a more satisfactory classification will be possible. Meanwhile, some formal system of classification such as that suggested above, supplemented by terms descriptive of the spirit of government will be found satisfactory enough for ordinary purposes.<sup>5</sup>

### THE FEDERATION

The importance of the modern federation as a form of governmental organization makes it worthy of special mention. Confederations have been known from the earliest times, beginning with confederated hordes and tribes and passing on to confederations of village communities, city states, and kingdoms.<sup>6</sup> As a permanent form of political organization, however, the confederation is weak and inefficient. There is no real unity, the parts are practically sovereign, and all act together only at times of great crises. Their many interests are so diverse that a firm and definite policy becomes impossible. Historically confederations end by falling apart into their constituent elements, or come under the control of some dominant member and gradually become unified in sovereignty.

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<sup>5</sup> For chapters on classifications, see, for example, Willoughby, *The Nature of the State*, Chap. XIII, and Bluntschli, *Theory of the State*, Book VI.

<sup>6</sup> For a study of Greek confederations, see E. A. Freeman, *Federal Government*, note also Hart's *Federal Government*.

Yet in government there is real need for a form that will allow kindred communities having common interests to retain their individuality and at the same time have a permanent and clearly defined central organization, empowered to manage on its own initiative important matters of general interest. This device was developed in the United States of America by changing the old confederation of the Revolution into the present federation. The distinction between these two forms was not clearly perceived at first, but the result of the Civil War settled it for all time, just as the *Sonderbund* War of Switzerland in 1846-7 changed the old Confederation into a Federation, even though the term confederation is still retained in the constitution.

**Contrasted with the Confederation.**—In a confederation the several states composing the unity are individually sovereign, and are merely bound together by a sort of treaty relationship, under the terms of which a joint organization is effected for the performance of specified functions delegated to it. As each state in the union remains sovereign it may legally secede at pleasure, influenced only by the fear of consequences in case it violates obligations existing between itself and the other states of the confederation. In a federation, however, this right of withdrawal is not claimed by the commonwealths in the union, which can only be dissolved by mutual consent. In such a union the sovereignty of the several states merges into the sovereignty of the totality and the commonwealths cease to be international states. They differ, however, in status from provinces or departments in that their autonomy is fully safeguarded by constitution. Furthermore, they are given by constitution a determining voice in the federal government

and in the amendment and revision of the national constitution. In a federation, therefore, the unity is permanent and definite, not dissolvable at the whim of one or several of its parts, but only by the united will of all. Its federal government exercises powers that cannot be hindered by individual commonwealths, and that must be altered if at all by united action under the constitution. On the other hand, the commonwealths of the federation exercise sovereign powers in purely local matters without interference from the federal government, and each has a voice in the settlement of all matters that concern the welfare of the union as a whole.

**Origin of Federations.**—Not all federations, however, arise as the result of the union of sovereign states into a consolidated sovereignty. The Latin American federations,<sup>7</sup> for example, were artificially formed by subdividing each national area into provinces, or "states," and then by constitution bestowing upon them autonomous powers not controllable in theory by the federal (national) government, after the pattern set by the United States of America. The British colonial federations<sup>8</sup> are, of course, not sovereign states but are federal in form, under the sovereignty of the Empire. Of these the constitution of Australia is the best illustration of a true federal form and that of the Union of South Africa least so. The British Empire which by theory is unitary, since the autonomous powers of the several Dominions depend on the decision of the Parliament, may some day conclude to reorganize as a federal empire, in which case autonomous powers by constitu-

<sup>7</sup> Mexico, Venezuela, Brazil, and Argentina.

<sup>8</sup> Canada, Australia, South Africa. For comparison of these along with that of the United States, see Arthur P. Poley, *The Federal Systems of the United States and the British Empire*.

tion would be vested in the several "states," or commonwealths, thereby making them integral parts of the Empire.

**The Utility of the Federation.**—The advantage of a federation is obvious. By its emphasis on local autonomy it safeguards local interests and allows each commonwealth to govern itself as it pleases, and yet by the establishment of a permanent central government empowered to manage without interference the general interests of the several commonwealths, it allows the development of an immense empire, which can utilize the strength and energy of all the parts for the common defense and general welfare. On the other hand, the powers granted or reserved to the states may be of so general a nature, or so numerous, as to hinder the federal government in the formulation of international policies, thereby weakening the state in its international relations. The Federal Government of the United States of America, for example, is handicapped in securing the treaty rights of aliens by the powers reserved by the States in regulation of aliens resident within their borders. In such cases, when the necessity arises, readjustments can be made by constitutional amendment or by understandings arranged by the parties chiefly concerned.<sup>9</sup> In this century, when the movement toward the formation of world empires is so marked, a well-organized federation with its dual form of government has a distinct advantage over rival empires, notwithstanding slight defects such as those just mentioned. These are unwieldy because of their bulk, or mechanical because of the immensity of general and petty interests

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<sup>9</sup> The several agreements respecting immigration between Japan, the United States and California are illustrative of this possibility.

controlled by a central organization. This fact is becoming increasingly recognized in political theories, and there is in consequence a strong tendency toward the formation of federations. One might surmise that within a reasonable time federations will develop in Central America or among the four southern states of South America, or among the states of the Caucasus, or the East Baltic states, or even among the Balkan states, hostile though they are one to the other.

**Dual Form of Federal Government.**—As a federation necessitates a dual form of governmental organization, the three usual departments of government will in consequence be duplicated. Thus, in the United States of America the Federal Government is made up of a President, a Congress and a judicial system organized under the Supreme Court. But the forty-eight commonwealths unitedly form a coördinate part of government, and this is made up of the governors as executive, the legislatures as lawmaking body, and the courts as supreme in local juridical matters. The national Constitution is not the constitution for the Federal Government only, but for it and the combined commonwealths alike, since the powers of both of these coördinate parts are derived from the Constitution. The executive for the dual government of the United States of America, therefore, is made up of the President and the governors;<sup>10</sup> the lawmaking body is composed of Congress and the legislatures, and the judicial system includes the courts of the commonwealths and of the Federal Gov-

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<sup>10</sup> From the international standpoint the President only is recognized by foreign states, since the commonwealths as such have no international status and the war and treaty powers are in his hands, subject, of course, to the war powers of Congress and the treaty powers of the Senate.

ernment. This may be illustrated by noting that the Constitution is amended by the joint action of Congress and the legislatures—the lawmaking body for the union as a whole. In popular discussions this dual form of government is often obscured or confused, and the Federal Government spoken of as synonymous with the United States of America, but a moment's reflection shows that this is a loose use of terms and without legal justification.

Other federations might be used similarly as illustrations. The Federal Government alone is never the complete government of its state. The commonwealths with their special governments unitedly form a coördinate part of the government, and the two coördinate parts, federal and local, form the complete government of the state.<sup>11</sup>

### CLASSIFICATION OF GOVERNMENTAL FUNCTIONS

In Chapters V to VII attention was called to the many-sided activities of government as manifestations

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<sup>11</sup> Using the United States as example, the following diagram indicates the dual nature of a Federal Government:

### GOVERNMENT OF THE UNITED STATES OF AMERICA

#### FEDERAL GOVERNMENT

1. Executive
2. Legislative
3. Judicial

#### THE COMMONWEALTHS

1. Executive
2. Legislative
3. Judicial

#### 1. EXECUTIVE

- President
- Governors
- Heads of Administration

#### 2. LEGISLATIVE

- Congress
- State Legislatures

#### 3. JUDICIAL

- Supreme Court System
- State Courts

of the sovereign powers of the state. It would be possible to classify these activities as primary or secondary, essential or non-essential, putting under the first heading those that strictly appertain to the negative function of the protection of life and property, and under the second heading those that by contrast stress public welfare in a positive or constructive fashion. The suppression of crime or a defensive war would illustrate the first, and the encouragement of recreation, or the fine arts, or education, the latter. Such a classification, however, is of small importance and probably no two persons could agree as to the proper assignment of many activities.

**Classification by Departmental Activities.**—A more common form of classification would be to classify by grouping together activities of a similar nature, such as war, finance, commerce, agriculture, labor, education, transportation, colonial administration, and others readily ascertained by noting the kinds of governmental administrative departments, with their subdivisions, as organized in any given state. The numerous administrative departments of an empire like Great Britain, or the scientifically organized bureaucracies of France or of Germany, for example, would furnish excellent classifications of concrete governmental functioning.

**Five Classes of Governmental Functions.**—For theoretical purposes the functions of government may be divided into five classes, namely, the deliberative, legislative, executive, administrative, and judicial. These may be defined as follows:

- I. The deliberative function is to determine what is the will of the state.
- II. The legislative function is to formulate into law the will of the state.

III. The executive function is to see that the laws of the state are carried out.

IV. The administrative function is to carry out the laws of the state.

V. The judicial function is to interpret the law and to adjudicate its remedies and penalties.

Each of these several functions will now be briefly explained.

I. *The Deliberative Function.*—In every state there will always be one or more bodies authorized to discuss and settle on a policy, which will represent the desire and aim of the state. This function in older forms of government is regularly exercised by the executive aided by a council, but in modern states is shared between the executive and legislative departments. At present the function of deliberation seems to be passing into the power of special bodies, nominally controlled by the executive or legislative department, or by both, but for all practical purposes separate and distinct. As illustrations may be noted the development of a cabinet, after the English fashion; or the deliberations of a bench of judges as to what is the law of the land or its proper interpretation; or the development of the permanent committees of American lawmaking bodies, whose chairmen virtually form an inner cabinet for the formulation of legislative policy; or the many commissions appointed to study some problem of importance and to make recommendations respecting a proper policy; or the rise of the constitutional convention, dictating as it does in the constitution a legislative policy binding on the legislature and the other departments of government.

II. *The Legislative Function.*—This policy, when agreed on, is formulated into a command, either defi-

nitely expressed as legislative law or executive decree or order, or else tacitly expressed and made known through actions of governmental officials. Judicial decisions, for example, are in effect formal notifications of what is the law of the land.

III. *The Executive Function.*—The executive function involves the exercise of oversight, coupled with the power to compel obedience to the law. Naturally this function is chiefly confided to the executive who may recommend to a lawmaking body, as in the President's message, action respecting matters needing attention. But a lawmaking body may itself survey the national situation and take action without waiting for suggestions from the executive. A judicial department also may be given oversight over the activities of lower courts, or a grand jury may survey the crime situation within its jurisdiction and prefer charges against persons suspected of crime.

IV. *The Administrative Function.*—In every state there must be numerous bodies of officials set apart for the performance of the work and routine of governmental business. These bodies collectively make up the administration or civil service, which is usually placed under the direct authority of the executive but may happen to be more immediately under the control of the lawmaking body. By law the control over judicial administration is regularly placed in the courts. There is a tendency in modern governments to differentiate the organization of the administration from the executive department, leaving to the latter only a general power of supervision over administration.

V. *The Judicial Function.*—The judicial function is, of course, chiefly exercised by the judicial department,

if one be organized, or otherwise by the executive in old-fashioned governments. But some judicial power is also usually exercised by the executive and legislative departments, even though there is an organized judicial department. The executive, for example, may have judicial functions respecting cases arising in the army or navy or over administrative courts.<sup>12</sup> A legislative department may have judicial powers over its own members or over governmental officials through the process of impeachment.

Under modern conditions, therefore, even though in form a government may be organized into the usual three departments, each apparently having but one function, it will regularly be found that each of these is performing two or more of these fivefold functions.

Warfare, the primary activity of the state, may be used as a simple illustration of this classification of governmental functions. The head of the army, acting for the state in war, first deliberates on a policy or plan of action. The decision when made is announced in the form of a command. The proper officials at once proceed to carry out the details of the plan under the oversight and direction of the head. If a subordinate should disobey orders, he is brought to trial, his disobedience and the extent of his offense are shown, and a proper penalty imposed. These fivefold functions are involved in every complete exercise of sovereignty, whether manifested in primitive or in modern times; thus a town meeting, for example, may deliberate, formulate, appoint a committee from its own membership to perform the order, supervise the doing of it, and punish by reprimand for neglect or disobedience.

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<sup>12</sup> See page 217.

**Origin and Differentiation of These Functions.—**

One might naturally expect that there would be five distinct divisions of government, each authorized to perform one of the five classes of functions; but in practice such a formal separation would be impossible. If the divisions of government are traced historically, it will be found that in primitive or ancient governments all of these functions were exercised by a body of elders or by a king aided by his council. The same body formulated a policy, in other words, made it into a decree, carried out its injunctions, supervised the performance of it, and settled finally all violations. At later stages of development these various functions separate or differentiate to some extent and are performed by different sets of officials. The deliberative function, for instance, may be exercised by a special body of persons who would personally advise the king or executive as his council. This deliberative power may be supplemented by adding the right to formulate its decisions into law (legislation) on approval of the king. Again, the decision of judicial questions may be left to picked men expert in the law, who sit on the king's seat and make decisions in his name. Or, lastly, the management of certain parts of the administration may be transferred to responsible and capable men, who would perform their functions with but slight control or interference on the part of the executive. The modern government in its formal organization usually consists of three great divisions: the executive, the judicial, and the legislative. But, as already mentioned, in ancient or old-fashioned states, there is usually but one department, the executive aided by a council, which performs all of the functions of government.

## CHAPTER XI

### THE DIVISIONS OF GOVERNMENT

#### THE SEPARATION OF POWERS

The development of the three usual divisions of government has furnished to students of political philosophy two important theories, that of the separation of powers and the check and balance theory. A brief account of these important principles may prove useful.

**Montesquieu's Theory.**—When all governmental power was centered in the hands of the executive there was little need to originate theories in respect to the separation of powers, but when a differentiation really had taken place, then some discussion became necessary. Aristotle gave us the first formal statement of it when he divided governmental functions into the deliberative, administrative, and judicial, lawmaking in the modern sense being almost unknown in his day.<sup>1</sup> His discussion had no practical importance under the autocratic Macedonian and Roman empires but was revived during the Renaissance and played some part in the political discussions of that period. In the eighteenth century Montesquieu<sup>2</sup> in his study of the English Constitution came to admire that system of government, and in his *Spirit of Laws* sought to show the advantages of a

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<sup>1</sup> *Politics*, Book IV, Chap. XIV (Bohn edition).

<sup>2</sup> See pages 122-123.

separation of the executive, legislative, and judicial powers. He argued that in order to secure justice in the state, each set of powers should be placed in the control of a different set of officials, in order that the same officials should not have the power to make and enforce the law, and to punish infractions of it. Rousseau in his *Social Contract* added the important principle that power over the fundamental law should always rest with the people, in order that the government as a whole might not become tyrannical.<sup>3</sup>

Montesquieu's theory of separation has become a democratic principle, though its application varies considerably in different states. It is carried out most logically in the American national system, in which the three departments of government are by law coördinate in importance, each controls its own set of functions and each is as independent of the others as is feasible with the unity of government. In other states there is often a formal but not a real separation, in that some one department tends to dominate the others.<sup>4</sup> In France the administration is largely made independent of the legislative and the judicial departments through the organization of a special code of administrative law and procedure. In the new constitution of Uruguay, adopted in 1917 and in effect March 1, 1919, the administration of internal affairs has been largely taken from the President and intrusted to a National Council of Administration of nine members, elected for a six-year term.

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<sup>3</sup> The electorate in the England of Montesquieu's time was so insignificant that he paid no attention to it. Rousseau in contrast believed that liberty was impossible unless the people had in their hands the ballot and controlled the government.

<sup>4</sup> Note, for example, the dominance of the lawmaking body in Great Britain and France.

This is a decided innovation and probably a move in the right direction. The commonwealths of the United States of America in their constitutions formally separate the three divisions but by an illogical assignment of powers often fail to separate them in fact.<sup>5</sup> In New York, for example, the executive has a large control over legislation, while in Rhode Island the assembly controls almost all of the executive functions and in addition elects the judiciary.

**Powers of the Usual Three Departments.**—When governmental powers are logically divided, the usual powers held by the three departments, respectively, are as follows:

I. *The Executive Department.*—The executive department has (1) the right to represent the dignity and personality of the state; (2) war powers, including management of the army and navy, and the power of declaring war and peace; (3) general oversight of the entire organization of the government, involving the right to take the initiative in action in case of sudden emergency; (4) headship over the administration; (5) the power of appointment to all important offices under the state.

II. *The Lawmaking Department.*—The lawmaking department has (1) the power to decide what is and what should be the law of the land; (2) the power to determine the amount and kind of taxes to be levied and to control the levying and expenditure of these. Legisla-

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<sup>5</sup> See, as an example of formal separation, the Massachusetts Constitution, Part I, Article XXX.

"In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

tive bodies often share with the executive the power to determine the policy of the state, both domestic and international, and of general oversight over public welfare.

III. *The Judicial Department.*—The judicial department has (1) the power to interpret the law so as to apply its remedies and penalties in all cases submitted to the courts for decision; (2) in the United States of America the national Supreme Court has the power to decide *finally* the meaning and authority of the law in all judicial cases that arise, even though such decisions practically involve the nullifying of laws or rules made by the legislative and executive departments. A similar power is exercised by the State supreme courts each within its own jurisdiction.

**The Check and Balance System.**—Manifestly it would be absurd to separate the three usual divisions of government so far as to make each entirely independent of the others. In order to avoid such a chaos of authority and to unify governmental powers, a system of checks and balances has developed in all modern governments, though worked out most carefully in the United States of America. The theory of checks and balances<sup>6</sup> goes back to ancient times, since it was fully discussed by Aristotle, Polybius, and Cicero some two thousand years ago. The fundamental idea is that in a state there are always diverse interests seeking expression in and through the government, and that no one of these should become so powerful as to have the others completely at its mercy. This thought is applied later in connection with the theory of the separation of powers so as to develop a system whereby each separate division of gov-

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<sup>6</sup> See Montesquieu, *Spirit of Laws*, Book XI, Chap. IV; Blackstone's *Commentaries*, Book I, Chap. II.

ernment might be controlled by, and in return control, the other divisions. In this way each division checks the others if they become tyrannical, and is itself checked by similar powers held by the other divisions. Thus a bill of rights inserted in the fundamental law is a check on possible governmental tyranny against citizens; the power of removal for cause is a check on administrative incompetency, and the power of pardon in the hands of the executive is a check on excessively severe judicial penalties. In the same way the veto power checks a legislature, and its power of impeachment may check abuses of power on the part of the executive and the judiciary. In a federal system the constitution in general has an elaborate series of checks, so as to safeguard the commonwealths against the federal government, and the government against the commonwealths. Thus, an appeal to the national supreme court may be made by either federal government or state on a question of final interpretation of the constitution.

It should not be assumed, however, that the principle of the separation of powers is one in general use. Outside of the United States it meets with little favor, and in the United States is found chiefly in the Federal system, having made little headway in State or municipal government. It is probably retained in the Federal system because of the extreme difficulty of effecting a radical change in the Constitution, such as that would be. The separation of powers in English government noted by Montesquieu was temporary only, being followed by the cabinet system of government in which the executive and legislative bodies are unified in policy through the Cabinet—a body exercising at once deliberative, legislative, executive, and administrative functions. The

cabinet system or some modification of it prevails among the European states, as against the separation of powers and check and balance system, which is thought to stand in the way of unified governmental action. The American deadlock between the President and the Senate (1920) over the ratification of the German Peace Treaty illustrates clearly the evil complained of.

### THE DIFFERENTIATION OF POWERS

There is another aspect of governmental power, distinct from the theory of Montesquieu, which might better be referred to as the differentiation of powers. Government has become much more complex since the eighteenth century announced a threefold separation of powers, and complexity always involves added differentiation.

I. *Differentiation of the Administrative from the Executive.*—Attention has already been called to the fact that administration is rapidly differentiating from the executive function. Modern governmental administrative systems with their administrative law, administrative courts, and fixed tenure of office are virtually units in themselves and connected in a shadowy sort of way only with the executive. It is a mere matter of time, therefore, before such states as France, for example, will speak of four departments of government, and name as a fourth the administration. The new constitution of Uruguay already referred to is an illustration of this tendency.

II. *Differentiation of the Lawmaking Body.*—Again, up to the nineteenth century, very few laws were made by lawmaking bodies and the few which were made were

fundamental in importance. For the last hundred years, however, lawmaking bodies, especially in the United States, have assiduously devoted themselves to the annual or biennial multiplication of laws, mostly in respect to matters of small importance. Unwise and petty legislation is so characteristic of modern American legislators that they seldom enjoy public confidence. In consequence, a special lawmaking body has developed, the constitutional convention, authorized in conjunction with the electorate to make the fundamental law of the written constitution. This has become a most efficient check on legislative incompetency, as the personnel of conventions is regularly high and the law they formulate serves as a check and regulation on statutory legislation. In the United States, therefore, more especially, but in other states as well, lawmaking has differentiated into two parts: the fundamental law of the written constitution, and statutes or acts made by the usual lawmaking bodies. For this reason it would be entirely proper to speak of another department of government, the *legal sovereign*, and to define the term as "that person or body of persons having the legal right to make, revise, or amend the constitution of the state."<sup>7</sup>

III. *Differentiation of the Judiciary.*—But this is not all; in the United States of America the Supreme Courts have final decision as to the meaning of national or local constitutions, so that all laws conflicting with the declared meaning of the Constitution are virtually pronounced by the courts to be null and void. As court dockets grow in length, there is a developing tendency to delegate to inferior courts of appeal for final settlement all cases that do not involve an authoritative interpreta-

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<sup>7</sup> See Chapter IX.

tion of the Constitution. The time is not far distant, therefore, when in the United States that will be practically the sole function of its Supreme Courts, and this change would make them in essence a department of government separate and distinct from the ordinary judicial system.

IV. *Differentiation of the Electorate.*—There is, however, a most important differentiation of power in development that regularly escapes the notice of political theorists. One of the most puzzling problems in all political science is to ascertain what writers mean who speak of "the ultimate sovereignty of the people," "the location of sovereignty in the people" or "popular sovereignty." As a rule, such writers become confused by trying to harmonize an ethical principle borrowed from natural rights and the social contract theory, to the effect that a people should control sovereign powers, with legal conditions entirely at variance with the principle. Outside of Switzerland it would be hard to show any state of which it can be said that the people legally possess the full powers of sovereignty.

In place, therefore, of ethical discussions as to whether the people should or should not rule, attention might better be fixed on a neglected department of government, namely, the *electorate*. The powers of the electorate are as truly governmental as are the powers of the usual three departments. Through the suffrage it exercises the executive power of appointment and may compel resignations through the recall, through the use of the initiative and the referendum it may exercise large and important lawmaking powers, and by its right of jury service it aids the judiciary in the settlement of civil and criminal cases.

If the electorate should include all adult citizens, male and female, and by election should appoint all important executive and administrative heads, all lawmakers, and all judges, and should have over these the right of instruction and of recall; and if it had, as in Switzerland and in Oregon, California, and other commonwealths of the United States, the right of initiative and referendum even in respect to the constitution, then one might properly say that the electorate voicing the will of the people, had in its hands the sovereign powers of the state. The tendency throughout the modern world is unquestionably in this direction, even though as a matter of fact, electorates, as a rule, have comparatively few powers and there are many restrictions on adult suffrage. In no legal sense, therefore, can it be asserted that the people as a rule are legally sovereign.<sup>8</sup> If, however, it seems desirable to favor such a form of government, the membership of the electorate must be enlarged by the extension of suffrage so as to include the fifty to sixty per cent of the population where adult suffrage prevails, and the powers of the electorate must be added to by increasing its control over law and administration. If, however, aristocracy is the form of government favored rather than democracy, the membership of the electorate should be reduced by adequate restrictions and its governmental powers minimized.

**Broader Definition of Government.**—If one were to define the term government broadly, in harmony with this explanation of governmental organization and differentiation, it might be said to be the sum total of those

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\* In political ethics, of course, it may be argued that the people have a "right of revolution," but legally there is no such right, and revolutionists are technically rebels.

organizations that exercise or may exercise the sovereign powers of the state.

Since all the sovereign powers of the state may be exercised through the following departments, singly or collectively, the government may be thus tabulated:<sup>9</sup>

1. The legal sovereign, maker of fundamental law;
2. The lawmaking department, making statutes;
3. The executive, from which is differentiating the
4. Administrative;
5. The judicial system, from which is separating (in the United States)
6. A special court for the authoritative interpretation of the written constitution.
7. The electorate, which is steadily increasing its powers at the expense of the three historic departments of government.

Doubtless for many years to come text-books and theorists will continue to discuss the threefold division of governmental organization, but in this age of governmental differentiation it is well-nigh impossible to get a clear understanding of government unless one considers the electorate as a fourth department. Furthermore, much more exactness in theorizing would be attained by separating, mentally at least, the legal sovereign from the other departments of government. The differentiation of administration from the executive is almost an ac-

<sup>9</sup> Government	Legal Sovereign	Lawmaking	Executive	Administrative	Judicial, having (in the United States) two clearly defined functions.	Electorate
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complished fact on the continent of Europe. The remaining specialization is peculiar to the United States of America and deserves special attention because of its political importance, for if the Supreme Court of the Federal department ultimately devotes itself only to final interpretations of the Constitution, the political party affiliations of the members of its bench will become a matter of increasing concern.

**Summary of Governmental Differentiation.**—This differentiation of the divisions of government may be summarized as follows:

In modern states the government is usually divided into three departments; the executive, the judicial, and the legislative. Historically, however, the last two are developments from the first, which is fundamental. In governmental systems these divisions are often largely formal and not based on an exact logical separation of the three great classes of governmental activity. The executive department, for instance, may exercise judicial powers through a series of administrative and naval and military courts, or it may formulate law under the name of decrees or ordinances. On the other hand, a lawmaking body, besides judicial powers over its own membership, or over certain classes of governmental officials,<sup>10</sup> may exercise large executive powers by dictating the personnel of executive or administrative organization.<sup>11</sup> A judicial department, also, by its power to interpret the law of the land, may in effect alter such law by legal fiction or by strained interpretations of the law itself. These three closely related divisions of gov-

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<sup>10</sup> By impeachment, for instance.

<sup>11</sup> By dictating the personnel of the cabinet, or legislating in respect to appointments to the civil service. France and Great Britain are typical illustrations.

ernment unitedly exercise such sovereign powers of the state as may be intrusted to them by constitution.

*The Executive Department.*—Historically the executive department arises from the body of elders and chiefs found in early primitive associations, such as the horde. These natural leaders guided the affairs of their savage communities, virtually performing the usual functions of modern governments. They knew the customs and announced them authoritatively, they led in war or chose a leader for that purpose, they administered routine business and adjudicated disputes. As the patriarchal stage developed and the horde passed into the tribe, this body of elders came to consist of the heads of families, who represented the wealth and importance of the several domestic groups in matters of general interest. The electorate in such systems may be considered as the tribesmen, clansmen, or villagers in assembly assenting to or dissenting from decisions made by the elders or heads. As bonds of closer unity developed, the head of the leading family began to assume greater prominence; and, as the ancestral head of the entire community, he gradually assumed the responsibility of leadership and oversight, aided by a council made up of the heads of prominent families. As the tribal community grew in wealth and importance with the growth of agriculture and commerce or by means of successful war, this head became a king, ruling by the will of the gods and through hereditary right. At a later stage he was himself considered a god, descended from gods, and even in life might be worshiped as a divine person. Such a system of government would naturally develop into despotism on the part of the king and abject submissiveness on the part of the people.

*Limitations on Royal Power.*—Evidently in a state of any wealth and importance, the king even though powerful would have to depend more and more on his council for advice and for the performance of governmental functions. Little by little, to these important officers were, as a matter of fact, delegated large powers in war, in judicial decisions, in religion, and in general administration. In great patriarchal states, therefore, the council became a deliberative body, which in the king's name formulated policy, transacted business, and rendered decisions in disputed cases. Under such a system the theory of despotism might survive, but the thing itself would be hedged about with restrictions placed on it by the influential classes in charge of the government. Such a monarchy is aristocratic or oligarchic, the real power being exerted by privileged classes of clergy and nobility.

If the middle and commercial classes should develop in importance through increased wealth and intelligence, then these also would have a growing share in government, since as an electorate they would begin to claim a voice in decisions and a share of the offices. The older patrician classes would reserve for their members the most important offices and the most intimate connection with the king, but would share with the influential members of the newer class minor offices and would consult them in matters that directly affected their interests. In England at least, under the Stuarts, the commercial classes fought for an independent judiciary, free from royal influence, so that justice might be obtained without fear or favor. It was during this same period also that the English made the distinction between a law paramount—a constitution—and mere parliamentary

statutes. In such developments as these we have all the essentials for modern governmental organization:

1. There is a king at the head of the government, whose autocratic powers gradually pass to a council made up from patrician classes. This tendency may go so far that the king's power becomes merely nominal, in which case he may be removed altogether and an elected head or heads take his place, as in the oligarchical governments of ancient Greece and Rome.

2. Increase in the business assigned to the council compels a differentiation of work. A specialized form of work, involving much routine and permanent activity, is transferred to the charge of one or several members of the council, and becomes ultimately a department of administration. In this way are separated one after the other such functions as religion, justice, war, finance, and taxation. As the business and activities of the state increase, these several departments of administration grow in number and importance. Each differentiates into bureaus or divisions and the whole system becomes a hierarchy of carefully graded offices, a bureaucracy, nominally under the supervision of the head of the state.

3. At the same time the council as a whole, or the most influential members of it, remains as a deliberative body having oversight over public interests as a whole. This is the ancestor of the modern cabinet, which in some form or other is found in every government. In this council or cabinet the principal departments are regularly represented by their most important officers, who thus perform a double function, serving as heads of administration and as advisers to the king or president. In France there is a sharp distinction between the Cabinet of Ministers in their advisory capacity, and the same

persons as a Council of Ministers serving in an administrative capacity.<sup>12</sup> Practically all continental European states have their administrations separately organized and regulated by a special code of administrative law and a special system of courts.

4. Meantime the department of justice so rapidly increases its duties, owing to the broadening out of the judicial function, that it ceases to be thought of as a branch of administration controlled by the executive and becomes by theory a separate division of government.

5. In times of rapid development there are many changes which involve increased taxation and modifications of existing law. The council by experience learns the wisdom of consulting more and more the most influential persons or interests affected by such changes. Such persons, or their representatives, thus have in connection with the king and council a voice in the determination of new policies or modifications of old ones. As the system develops, it may evolve into a lawmaking body, as in England, the council forming an upper house or chamber; and representatives of the other interests in the state forming a lower house. If progress in wealth and importance continues, this lower house may develop powers so large as virtually to deprive the upper house of its supremacy.<sup>13</sup> In this case the government passes into the hands of the middle classes and a conservative democracy is the result, even though in form the state still remains a monarchy.

This line of development involves in due time the differentiation of the electorate from their representa-

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<sup>12</sup> See Woodrow Wilson, *The State*, p. 226 (1898 edit.).

<sup>13</sup> This movement at the present time is best illustrated by the growing power of the lower house in Japan.

tives authorized to determine the law of the land, and these representatives in turn may differentiate into two bodies: one authorized to declare the fundamental law of the land (the legal sovereign), and the other to formulate detailed legislation under the name of acts or statutes.

This outline of governmental development illustrates in a general way the usual changes resulting from a progressive development from savage communal life down to the modern era with its democracy and growing complexity of political phenomena. Naturally there are many variations in detail in different parts of the world, but in a fundamental way the development outlined will hold true for all states in the line of progress.

**Russia as Illustration.**—This development may be illustrated more concretely by noting the rapid development of political changes in Russia in late years. At the beginning of the century the Government of Russia was a pure autocracy without constitutional guaranties. The Tsar, in the year 1906, promulgated for Russia its Fundamental Laws,<sup>14</sup> and the essential points of these may be stated as an illustration of a movement from a pure autocracy to a constitutional monarchy. In the constitution the Tsar is declared to be the supreme autocrat, his authority is ordered by God Himself, and his person is divine and inviolable. His enormously large executive powers, including the right to determine foreign policy, to declare war, or to conclude peace, were to be exercised in connection with a Council of Ministers whom he appointed or removed at pleasure, and one of whom had to countersign his orders or decrees. The

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<sup>14</sup> See, in the Bibliography, Dodd, *Modern Constitutions*, vol. ii, pp. 182-195.

chairman or president of this Council was directly responsible to him and represented him in the national Parliament. He reserved for himself the initiative in legislation in respect to fundamental laws, but shared with a bicameral body meeting annually other legislative powers, reserving, however, the right of veto. Furthermore, he appointed one-half the membership of the upper house, the Council of the Empire, and provided for the election of the other half for a nine-year term by representatives of the great interests of the state, such as the provincial assemblies, the nobility, the Church, the universities, and bodies representative of industrial interests. The membership of the lower house, the Duma, was to be elected for a five-year period by a four-class system, made up of landed proprietors, municipal voters, peasants, and laborers, and so arranged as to give a preponderance of votes to the wealthier classes. In addition to this newer organization were survivals of the old order in (1) the ruling Senate and (2) the Holy Synod; the first having judicial functions chiefly, and the authority to promulgate laws when properly passed by the Parliament and approved by the Tsar, and the second having jurisdiction over the religious affairs of the Empire.

In that document, therefore, may be observed a grant of powers emanating from a divinely appointed autocrat and providing for the separation of divisions of governmental powers exercised respectively by a Cabinet, a national Church, a judicial organization, a lawmaking body, and an electorate, the last two representing additions to the older governmental organization. Legal sovereignty was to remain vested in the Tsar, who also

reserved final authority in administration, lawmaking, and judicial decisions.

This slightly modified autocratic system, however, proved unable to stand the strain of a great war. Inefficiency and corruption were so manifest that under the sting of defeat the nation rose in revolution, disenthroned the Tsar, and established first a rather conservative democracy, which under Kerensky became somewhat radical along socialistic lines, and this in turn was overthrown and a soviet form of government established.

The soviet form of government<sup>15</sup> is based somewhat on occupational interests, since the soviets are of three types—peasant, artisan, and soldier—each of these differentiating into communal groups which send delegates to provincial and national assemblies, not unlike in organization American political parties which send delegates to various grades of conventions, culminating in the national convention. Since the dominating, aggressive element in the maze of revolutionary factions were the Bolsheviks, these secured control of the Government, and are seeking to put their pet theories into effect. These are fundamentally based on Marxian socialism, with his teaching of national ownership, the rule of the proletariat, and communal regulation of education. As so frequently in revolutions, the radicals in command have become tyrannical and despotic, so that Russia in the short space of twenty years has passed through all varieties of government from autocratic tsardom to the despotic rule of ochlocratic tyrants.

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<sup>15</sup> For translation of the Russian constitution of 1918, see *International Conciliation*, No. 136, March, 1919.

## CHAPTER XII

### THE EXECUTIVE DEPARTMENT

#### **The Two Functions of the Executive Department.**

—If we examine more closely the functions of the so-called executive department, we shall see that, broadly speaking, there are two distinct sets of functions, the one properly executive and the other administrative in kind.

I. *The Powers of the Executive.*—The head of the executive department represents the unity and personality of the state in the conduct of governmental functions, both domestic and international. As a titular head of the state he acts as mouthpiece for the state in its intercourse with its citizens and with the representatives of foreign states. In performing the latter duty he conducts diplomatic negotiations, is in command of the army and navy, declares war, makes peace, negotiates treaties, receives and sends diplomatic embassies, and appoints all officials who assist in these duties. As representative of the state in its intercourse with its citizens he inspects the workings of the governmental system, makes or recommends improvements, and from time to time makes announcements of policy.

II. *Administrative Powers.*—The performance of governmental functions involves a vast mass of administrative machinery, complicated in its mechanism, and expensive and cumbersome in its workings. The head

of the executive is also the head of the administration; as such he has large ordinance powers,<sup>1</sup> appoints its officers, organizes its departments, assigns to each its respective functions, and oversees the working of the entire administration, enforcing, if necessary, his orders and the law of the land by means of the war and police powers placed in his hands, and by his power to compel recalcitrant officials to resign.

Through these two sets of powers he maintains peace at home and abroad, makes war and suppresses insurrections when necessary, and supervises the entire workings of government so as to insure the prosperity and development of the state. Powers so enormous are too onerous and arduous for one man, and, moreover, if left entirely in his hands, might easily make him tyrannical, hence there have developed numerous devices intended either to lighten his burdens or to check his power. These will be explained more in detail in connection with later discussions in regard to the development and powers of cabinets and of the judicial and lawmaking departments.

### THE EXECUTIVE HEAD

**The Development of Leadership.**—As already explained (Chapter III) there are many variations in political development owing to widely differing conditions. Yet the process is so similar that a type of governmental development can be set forth which is practically identical everywhere. The starting point is the body of older and wiser men found at the head of the group in all early systems of organization. This body

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<sup>1</sup> See pages 279-280.

may consist of men eligible because of age and consequent wider experience and knowledge; or of heads of smaller groups such as families or war bands; or of men who by natural talent have shown themselves worthy of a place in the council. Among these the oldest or the wisest or the head of the leading group or the most capable leader in battle would naturally gravitate to the headship, whether attained by right of birth, by free choice, or as in many instances, by force. In this council, with its head, we have the beginnings of modern political organization, the development of which will now be indicated.

The head, as already suggested, might attain his supremacy through force. History is filled with records of great leaders who by their ability in war have founded states and dynasties. Under these circumstances it is a natural tendency for such a leader to seek to hand on his power to the members of his own family, an ambition readily suggested by the hereditary rights of the fathers in a patriarchal system. Even if the head of a state were chosen by the free votes of the council, the natural fondness for power inherent in the human heart would tend to develop intrigues for the perpetuation of power in the family. In this way there developed in all kinds of advanced political groups hereditary rule, based on the analogy of the patriarchal system and appropriating from it its notion of divine right and authority. From the council were selected intimate advisers, assistants in the administration of business, and personal attendants.

**Rise of Monarchy.**—As the wealth and power of the state increased, leadership became kingship, and the classes of officials developed definite functions as an advisory cabinet, as heads of administrative departments,

and as a court retinue. Among these offices came graduations in importance as system and differentiation became necessary. This gave to the cabinet a chief, or prime, minister. All these offices at the beginning were under the control of the king, who might appoint or remove at pleasure. But the desire for hereditary power influenced office-holders also. Many of the most important offices became hereditary, resulting in the rise of a class of nobility, holding wealth and office by inherited right, and steadfastly supporting royal power as essential to their own. The rise of the church in importance developed a similar class among the superior priesthood, who also faithfully supported the king in return for his promotion of ecclesiastical interests. This furnishes us the type for an autocratic monarchy, whose head, ruling by hereditary and divine right, was deemed a mouthpiece and vicegerent of the gods, and who might himself become a god at his death. Changes of dynasty might take place, kingship founded on divine right might become a shadow power, the substance of which was held by the great nobles, the ranks of the nobility and of the priesthood might be recruited from capable men of lower ranks, but whatever the differences in detail, such autocratic monarchies developed in many parts of the world, ruling millions of people and inculcating into men's minds principles of law, order, submissiveness, and respect for authority. Such monarchies in modern days are rapidly passing away, but survivals of them may be noted in Siam and among the native dependent princes of India.

**Royal Power.**—Kingship has played so important a part in the political history of the human race that the tendencies in regard to that office are well worth noting.

In early political systems the king was merely *primus inter pares* and exerted an influence proportionate to the strength of his personality and his ability in action. In despotic-autocratic systems he was by theory supreme, irrespective of his capacity or personality. In practice, however, there were limitations that often made the king a mere puppet. Enervating luxury and sensual temptations were at his command; etiquette and ceremony, religious requirements, customs and precedents of long standing, all fettered his individuality and repressed his initiative. Again, the necessity of delegating to others the business of the state, and of depending on them or *secret service* for knowledge of conditions hampered him. The red tape of a bureaucratic system was omnipresent and secret influences were always at work to thwart or to dethrone him. It is not at all strange, therefore, that autocracy tends to be a dreary record of tyranny, misrule, extortion, and oppression.

**The King Limited by Constitution.**—The system, obviously, conspired to make him ruler in name only, and to transfer the real power to others eager for their own advancement. As a matter of fact, the power actually exerted by an autocratic king and his council is not to be compared with the power exerted by the executive and his cabinet in a modern democracy. The one exerts power in a spasmodic, spectacular way and is chiefly concerned with taxation and warring, but the other, knowing just what he can and cannot constitutionally do, exerts a powerful continuous influence within his sphere that far outweighs the irregular activities of a monarch theoretically autocratic but practically restricted on every hand in matters of importance. The movement, therefore, already outlined, whereby the larger part of the

power of modern rulers has been transferred to the other departments of government, does not imply that the executive head has really lost power. It means that his authority has been restricted to activity along certain definite lines, but within those bounds he may happen to exercise a totality of powers far in excess of the amount of power exerted by his autocratic predecessors. This is even more true because of the remarkable extension of governmental activity within the last one hundred years. During this period the scope of governmental activity has multiplied by leaps and bounds. The executive power of the President of the United States of America is an excellent illustration of this principle. He exerts a far wider and more powerful influence than did the Tsar of Russia and probably wields more authority than any other executive on earth. Even the King of Great Britain, shorn apparently of all his authority, probably exerts a deeper personal influence over the affairs of the empire than did the Tsar, who, though by theory autocratic, was yet checked on every side by a powerful bureaucracy and was repressed by the constant fear of assassination or revolution.

**Types of Governmental Headship.**—The existing governments of the world well illustrate the various stages of headship and royal authority. The rule of chiefs surrounded by bodies of elders is common among the native races of South America, Africa, and northern Asia. Patriarchal authority is well illustrated in the petty principalities of India and in the newly formed Arabian kingdom of Hejas; divinity in kingship is seen in the attitude of the Japanese towards their Emperor; and Great Britain and the Scandinavian kingdoms have developed constitutional kingship to its fullest extent.

One important effect of the Great War lay in the destruction of the historic Empires of Russia, Germany, and Austria-Hungary with their hosts of environing nobles and federated kingdoms. Obviously the present trend is away from hereditary monarchs to the system of elective headships.

When kingship is superseded by an elective headship, similar variations in power are possible. The President of Mexico is practically an autocrat ruling under the forms of a republic, the President of the United States of America, as already indicated, is perhaps the most powerful of modern rulers, due to the fact that his powers are delegated and named in the Constitution; yet he could easily be removed by impeachment if he tried to become despotic. The President of France, like the English King, is a nominal ruler of few powers, though in form and by intention the office was made powerful; the President of Switzerland is merely the chairman of an executive committee which administers executive functions under the direction of the Federal Assembly. The President of Germany apparently exerts small influence in government, though that may be due to his lack of personality rather than to his office. On the other hand the Russian Dictator Lenine seems to be more tyrannical and autocratic in his powers than was the Tsar himself and like him he lives in constant fear of the bullet or revolution. It is evident that under present conditions the type toward which all modern states seem to be tending is a headship vested in either an hereditary monarch or in an elected president, whose powers will be carefully defined by constitution, and hedged about with numerous restrictions aiming to secure responsibility and efficient service in behalf of the citizen body. The real

power of the executive, in those states where the cabinet system of government prevails, is held by the cabinet, headed by its premier.

### THE CABINET

**The Autocratic Type.**—The movement of power from the executive head to his cabinet is clearly illustrated by the three great systems of cabinets existing in modern times. As the business of the state increases in amount and complexity, numerous departments are formed, each devoting itself to some special line of administrative activity. Some of these departments will naturally be more important than others, and the heads of these must frequently consult with the head of the state in making important decisions. These influential heads form the nucleus about which the king gathers his advisory council, formed by adding such persons as seem worthy on account of their wisdom and standing in the community, or their achievements in public service. In such a system as this we have a council, able to give the king both general and special advice, whose members are appointed by him and are individually responsible only to him. Such a council may divide into circles, in which case the cabinet will be the inner circle that regularly advises the king in the most important affairs of the kingdom, the larger circle being summoned only on formal occasions or for special emergencies. This is the basal form for cabinets in autocracies, such as was Russia in the nineteenth century and as types of modern variations from this will now be explained the cabinet systems of Japan, Great Britain, and the United States of America.

**Japan.**—Japan at present is the only one of the Great Powers that retains a close approximation to an autocracy. The Emperor has divine attributes, coming as he does from a line of rulers “unbroken for ages eternal,” and the Constitution of the Empire is a grant from him to his subjects, all or any part of which is in theory revokable at his pleasure.

The Constitution, prepared chiefly by a Commission headed by Count Ito, was modeled after the German Constitution as it was in the decade of 1880-90 when Bismarck was Imperial Chancellor. In the Constitution provision is made for a Prime Minister (Minister President) and Ministers of State who shall be responsible for the advice given to the Emperor and each of whom shall be responsible for the acts or ordinances he individually signs. In practice this responsibility is not to the Emperor, who keeps aloof from politics; nor to the Imperial Diet, or Parliament, which has no power to compel the resignation of a Cabinet; nor are the individual Ministers named by the Prime Minister and responsible to him. If the Emperor happened to have a decided dislike to a particular person, presumably his wish would have great weight, or if the Lower House of the Diet refused to favor measures recommended by a Minister, and persisted in its refusal, the inconvenience of friction might bring about his removal from office, but the Diet itself would have no voice in naming his successor.

*Japan's Bureaucracy.*—In Japan the administration or bureaucracy is strongly organized and possesses the actual power of government, though it is largely influenced in important decisions by the unofficial advice of the surviving *Gnro* or Elder Statesmen who established

Japan on its reorganized basis.<sup>2</sup> It is the bureaucracy voiced by its great leaders that really determines the personnel of the Cabinet. If a reorganization becomes necessary through changing conditions or on account of friction with the Lower House, the personnel of the new Cabinet will be suggested to the Emperor by the *Genro*, voicing the bureaucracy, and will presumably include several members of the retiring Ministry. The members of the Cabinet are selected from the leaders of the bureaucracy itself and hence voice the administration, not the dominant political party or party coalition in the Diet that disapproved of the retiring Ministry. In fact members of the Lower House are rarely members of the Ministry, who yet have the right to speak in either House, though of course they vote only if they happen to be members in one or the other. Since the Cabinet, then, is the exponent of the administration as a whole, the Prime Minister has not large powers by virtue of his office, though by intention it was expected that he would occupy a place in the Japanese system similar to that of the German Chancellor. He tends to be merely chairman of the Cabinet, which unitedly is responsible for the acts of its members and for its own policy to the *Genro* or to the heads of the bureaucracy.

The Japanese system of cabinet government, therefore, is obviously based on autocratic ideas, except that the real power has, in fact, largely passed from the Emperor to the administration, being entirely too burdensome for any one man; at present the popular will voiced by the Lower House of the Diet is not able to dictate the

<sup>2</sup> Just as in the United States of America, the opinions of John Adams, Jefferson, and Madison while they lived had great weight in national policy after their retirement from office.

personnel of the Cabinet and consequently has little influence on policy. One might surmise that within a generation this situation will be changed and a far more democratic condition will prevail in Japan, though presumably at the cost of governmental efficiency.

**Great Britain.<sup>3</sup>**—In Great Britain also, as in Japan, there is a vast array of administrative departments, but these are not to be thought of as unitedly a well organized bureaucracy dominating executive policy. Rather these are considered as subordinated to the Ministry or Cabinet. Members of the Cabinet are individually, as a rule, each in charge of a department of administration, but they are in charge of administration because they are Cabinet members. They are not Cabinet members because they are leaders in administration, as is the case in Japan.

If as the result of a national election an existing Cabinet finds itself in the minority in the newly-elected House of Commons, the Prime Minister, or Premier, and the other members of the Cabinet submit their resignations to the King with the recommendation that the leader of the opposition party, having a majority in the House, be appointed Prime Minister. According to precedent the King will comply with this recommendation and the new Premier will then recommend from the list of his party leaders suitable men to head the numerous departments of administration, selecting from these the most important, usually about twenty, to form a Cabinet.<sup>4</sup> This Cabinet under the leadership of the Premier formulates

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<sup>3</sup> In this connection see Ogg, *Governments of Europe*, Part I, revised ed., 1920.

<sup>4</sup> During the Great War the inconvenience of having to consult so large a body resulted in the appointment of an inner War Cabinet of five-six members for the period of the war.

national executive and legislative policy and thus has in charge the general management of the Empire. Its membership must always be made up of members of one or the other House of Parliament, and each set of members may speak and vote in its own House but not in the other. This is a serious handicap in some respects and results in the selection preferably of the most important working members from the lower House so that they may be able to have voice in the dominant house. Cabinet meetings are informal, without written records, and the sessions are secret. The members decide on a common policy, sink their individual opinions, and stand or fall unitedly. The Cabinet having a united responsibility retains office as long as it can control a majority in the House of Commons.<sup>5</sup> If defeated on some fundamental question of policy, a new election is ordered and the successful party assumes the reins of power.

This system is built up on the supposition that there are always two great parties, the party in power and the opposition. Should in later elections the newer parties—Labor and Socialist—gain such strength that no one party has a clear majority, then the English cabinet system must undergo some changes and become more like those on the continent, France, for example, where many small parties exist, by contrast with the present two-party system of the British-American world. In France the Cabinet is made up of a coalition of the leaders of kindred parties, the effect of which is to weaken the power of the Cabinet itself and to increase proportionately the power of the lower House, the Chamber of Deputies. In passing, it may be said that the British

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<sup>5</sup>In France the *interpellation* is used for the purpose of overthrowing ministries.

system of cabinet government, with modifications, is used by most modern governments, though there is a partial influence from the United States of America to be found among the Latin-American states.

**United States of America.**—The third type of cabinet is that of the United States and is a sort of combination of the other two but with variations of its own. A President on taking office, receives the resignations of the administrative heads of departments. He then, with the formal approval of the Senate, which is rarely refused even though its majority membership be of the opposing political party, appoints other heads selected almost invariably from the ranks of his own party. No member of Congress is eligible for such office, though he may resign and then accept the appointment. The heads of the ten great Departments by custom are considered as a sort of Cabinet with which the President may consult. The President is himself responsible for executive policy and administration and, therefore, is not bound to consult the Cabinet or to be guided by its advice. It meets at his call, discusses such business as he may submit to it or such as he may permit to be discussed, and he may make decisions in flat opposition to their expressed opinion. Since its members are appointed by him, and may be dismissed by him at will without the consent of the Senate, its powers and prestige depend entirely upon his personality. He may on the one hand consult them regularly and defer to their opinion, or by contrast he may call them together irregularly, consult them in a perfunctory manner, and inform them of his decisions irrespective of their advice and opinion. Their real duties, therefore, are administrative, not political, and since they are not responsible for their political ad-

vice if asked they are under no necessity of resigning from office through difference of opinion. Even as administrative heads they are responsible to the President, who by Constitution is head of the Administration and hence may determine their policies if he desires. Being administrative officers, they have no rights to the floor of either House, since under the theory of separation of powers the executive department should have no voice in the formulation of law. Their chief influence on legislation is through recommendations made to Congress by the President and through hearings of Congressional committees before which they may be invited to explain or comment on bills affecting their several Departments.

**Contrasts in These Types.**—Contrasts between these three systems of cabinet are obvious and can readily be made. No one of these can be considered as inherently best, since each is suited to its peculiar situation and works best under its own environment. Japan, under the necessity of passing rapidly from feudalism into modern political life of a rather intense sort, deemed it best to develop a powerful, highly centralized bureaucracy able to determine policy and to force the nation to the front in world politics. A cabinet as the tool or voice of this bureaucracy was inevitable. When Japan's position among the world powers becomes assured, presumably it will tend to develop along British or French lines and have its Cabinet represent the dominant will of the Imperial Diet. Great Britain, a world empire, democratically organized, naturally concentrates power in a body that can command legislation and appropriations and subordinates to this body both King and administration.

The United States of America, for a century free from

foreign complications of a disturbing sort (down to 1914), felt no need of concentrating power either in Executive or Congress, but divided responsibility between these. The Great War brought about a crisis, resulting in the concentration of national authority in the executive head by legislative grants of power. The strain proved too burdensome for the President, who became incapacitated through illness, fortunately not until after the proclamation of the armistice and the formulation of a treaty of peace. Even in normal times the President has too great responsibility, and henceforth a new system should be devised that would allow for a group responsibility of some sort. Unfortunately custom and the Constitution are opposed to change, and the separation of powers set by the Constitution will prove a serious hindrance to any possible plan for the concentration of responsibility into a group representing both the executive and legislative functions.

It would be legally possible, however, provided the President gave consent and the Congress acquiesced, to concentrate the burden of administrative responsibility on some one of the departmental heads, the Secretary of the Treasury, for example, making him a sort of premier over administration, and thus allow the President to devote himself to the purely executive aspect of his duties, retaining a nominal supervisory power over his administrative duties. In any event the enormous powers of the President, over so great an empire as that of the United States, are obviously too great for any one man's endurance; the historic remedy has always been found in the transference of power to a political cabinet or to a body of administrative heads.

## CHAPTER XIII

### ADMINISTRATIVE ORGANIZATION

**Differentiation of Administration.**—Modern states vary largely in the amount and kinds of business to be administered, so that there is no close uniformity in administrative organization. Yet there are broad lines of development common to all advanced states, well worthy of emphasis, and these will be briefly indicated.

I. *Differentiation into Branches of Administration.*—The council of elders in primitive government, headed by its chief or chiefs, performed as a unit all kinds of governmental business. As states increased in size, administrative duties multiplied correspondingly and in time became too arduous and too important to be longer intrusted to the spasmodic activities of a general council. Specialization began, each important branch of activity being intrusted to those members of the council especially interested in that particular function, while at the same time the body as a whole remained with general supervisory powers, integrating thereby the differentiated activities of the specializing departments. Every new national function of a permanent sort would necessitate the organization of a new branch of administration, which would relate itself to kindred branches, so that there would slowly form in due time a mass of coördinated divisions or bureaus of administration, the heads of which, as members of the great council, would work

together under the general oversight of the executive head, or a chief of administration. This slow differentiation and integration of administrative organizations is characteristic of all developing governments, and at its maximum in great empires forms an exceedingly complex hierarchy of organizations and officials, unitedly making a considerable part of the overhead expenses of government.

II. *Differentiation of the Religious Function.*—In social evolution institutions often change in spirit while retaining their old form and hence may seek other affiliations than those once considered natural. Religion, for example, was once very closely identified with the state, coöperating with it in war and allied with it in the preservation of domestic peace. But with changing civilization religion added many peaceful functions, such as philosophic inquiry, religious speculations, and tasks of an æsthetic and educational aspect. There came a tendency, therefore, for the church to draw apart from the state, while still coöperating with it, so as to devote itself to its more important tasks of growth in spiritual and intellectual life. In this fashion the ecclesiastical organization tended to separate itself, in part at least, from the political organization, as already previously explained,<sup>1</sup> so that in due time the organization devoted to the observance and maintenance of worship and religious rites ceased to be considered in many states as part of the governmental administrative organization. In other states, however, the support and encouragement of religion is classed as a state function, but the connection between church and state varies from a close unity, as in Turkey or Japan, to an almost nominal connection, as in

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<sup>1</sup> Pages 91-94.

Italy. The United States of America and the United States of Mexico best illustrate a real separation between these two great institutions.

III. *Differentiation of the Judicial Function.*—The development next in importance was the differentiation that developed between the judicial business of the state and its other administrative powers. As the state assumed jurisdiction over violations of the peace of the state and over disputes in regard to the ownership of private property, the work devolving on the chief officials became so onerous, and at the same time so important, in that it affected the lives and property of the entire community, that it was gradually intrusted to special officials.<sup>2</sup> These became expert in the law of the land and trained in the application of the law to the numerous cases of every sort likely to arise among contentious persons in a complex civilization. There developed, therefore, numerous courts exercising widely varying jurisdiction, but at first not coördinated nor especially efficient. Later, the importance of their work was so thoroughly realized that progressive states early developed efficiency in this branch of administration, as in the case of England under the Plantagenets. Movements toward democracy also have regularly fought for system and justice in judicial administration; the radicals of Cromwell's time, for example, pathetically desired the law to be so simplified that even the common man might understand its rules and procedure.

Although in practically all states the judicial system is now organized apart from the ordinary administrative system, the executive has regularly striven vigorously to

<sup>2</sup> Note an illustration of this in Moses' career, Exodus XVIII, 13-26.

control the courts so as to enhance his power. The movement, however, in all democratic countries is toward a separation between the two; the judiciary is freed as much as possible from executive control, and placed preferably under the control of the lawmaking body and the electorate, under the theory that thereby the rights of the people will be more fully safeguarded. This formal separation has taken place most completely in British-American governments, but close approximations to such systems may be found in other modern states.

IV. *Differentiation of Lawmaking*.—A fourth differentiation consists in the gradual separation of a lawmaking body from the council with its deliberative and supervisory powers. This development will be traced more fully in later chapters,<sup>3</sup> but the importance of the change may be indicated from two standpoints:

(a) Modern lawmaking bodies in their present form aim to voice the will of the people as a whole, and hence represent a democratic tendency; the earlier system regularly voiced class interests to the neglect of the rights of the masses. (b) Such bodies have introduced slowly a process of lawmaking hitherto unknown, and the result of the innovation has wonderfully increased the possibility of progress. All ancient law was custom, and customs change slowly. Modern legislation assumes the right to abolish some customs, to alter others, and to make new ones, in every case compelling the people to conform to the new law. Even a constitution may be formulated, thus necessitating the reorganization of government so as to harmonize with the new requirements. This legislative development furnishes at least the possibility of progress, even though in actual experience

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<sup>3</sup> Chapters XV, XVI.

many laws are so vicious, absurd, and conflicting that at times much of legislation becomes a weariness to the soul.

*V. Differentiation of the Electorate.*—The development of an electorate<sup>4</sup> is in effect a differentiation of the same sort as the foregoing. The movement toward democracy, in seeking ways and means whereby it might check tendencies toward executive tyranny, hit on the happy expedient of bestowing on certain classes of citizens, heretofore unrepresented in government, the power to make by election appointments to important offices. In this way the electorate chooses, more or less completely, according to the strength of democracy in the several states, officials to make laws, to have charge of executive and administrative functions, and judges to serve on the judiciary. In more recent times there has developed a dread of legislative tyranny, and in consequence the electorate is demanding for itself direct rights in lawmaking. This is shown in the growing use of the initiative and referendum<sup>5</sup> and in popular control over the making of the fundamental law.

**Administrative Departments.**—The ancient powers of the executive, therefore, once so enormous through his control over administration, have been steadily reduced in scope by transfers of power to the church, the judiciary, the lawmaking body, and the electorate. The residue of powers is still centered in the executive department, but in place of one great council administering all such powers, there have been formed numerous inter-related departments, unified in the cabinet and under the authority of the head of the state, but differentiated in

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<sup>4</sup> See Chapter XVIII.

<sup>5</sup> See pages 298-302.

function. These administrative departments bear different names in different states and are not always separated on quite the same lines. Broadly speaking, however, there will be departments in touch with international relationships, such as war and diplomacy; and others to administer colonial possessions, if any, and state monopolies such as the postal service, railways, telegraphs, and mines; and to regulate important divisions of economic life, such as commerce, agriculture, and manufacturing. There will be departments also for the regulation and support of education and religion, if religion is controlled by government, and for the management of administrative judicial business and public finance, and for the supervision or control of local administration.<sup>6</sup>

Each department in charge of any particular function may itself be specialized and include several subdivisions, such as the American bureaus and divisions. The several departments of administration may be so loosely supervised that each is practically independent of the others and almost without supervision. On the other hand, they may be closely coördinated and strongly centralized under the executive, as in the French or Japanese cabinet system. The commonwealths of the United States of America furnish the best illustrations of a loosely coördinated, poorly supervised administrative system in state and city organization. Many departments, commissions, and boards have been organized with delegated powers, and these conduct their affairs almost without supervision and often with but slight thought of

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<sup>6</sup> In the United States the Departments are, in order of organization, State, Treasury, War, Justice, Post Office, Navy, Interior, Agriculture, Commerce, and Labor. In addition to these there are many detached bureaus and commissions having miscellaneous functions.

coöperation. There is, however, a strong tendency to consolidate and to centralize these departments and to place them directly under executive control.<sup>7</sup>

**The Civil Service.**—The management of an administrative department may be in charge of a board, or in a single head. These may hold office for life, or for a long or short term, or for an indefinite term during good behavior (*quamdiu se bene gesserint*). They may be appointed, or elected by the electorate, either directly or indirectly through elected representatives of the people. They may have the power to appoint their subordinates at will, or these may be appointed in accordance with definite rules and regulations, which may include a system of competitive tests and assignment of office on the basis of capacity and merit. These departments, with their numerous officials and clerical forces, unitedly make up what is called the bureaucracy, or civil service. Narrowness and inefficiency in its management and life tenure in office develop a bureaucracy characterized by an over-emphasis on routine and details, to the neglect of larger interests.<sup>8</sup> Political favoritism in appointments has also proved a fertile source of inefficiency and corruption. The problem of an honest, economic, and efficient administration of government is one of the hardest problems now before political theorists and statesmen.

**Officeholders.**—There are, broadly speaking, two classes of officeholders: 1. Those who have discretionary powers in the performance of their executive, adminis-

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<sup>7</sup> See the author's *Growth of American State Constitutions*, Chap. XIII.

<sup>8</sup> There is an amusing story current to the effect that a Bureau head of the War Department at Washington once complained, "I had my Bureau in perfect working order, with everything running smoothly, when along came the Spanish War and smashed up everything."

trative, legislative, and judicial functions, such as the heads of the various important divisions and subdivisions of government, and members of lawmaking bodies.

2. Those who have ministerial powers only, performing their duties under definite instruction, such as a clerical or police force, and the minor officers of the army and navy. The same person may have discretionary powers in respect to those below him, but be ministerial in his relations with his superior in the department.

Besides these, there are many persons hired by the government as menials or laborers, but these, not being engaged in governmental business, are not properly classed as officials.

Officeholders, again, may be classified into those who serve in the army and navy with their related branches and are subject to special military and naval rules and regulations; and those engaged in the *civil service*, that is, all administrative positions other than those in the army and navy. In most of continental Europe these are subject to a special system of administrative law.<sup>9</sup>

Officeholders may possess their offices by hereditary right or by appointment or election. An hereditary right to an office is based on the theory that every person who has large economic interests at stake should have in his hand sufficient political power to enable him to safeguard his interests. This principle had its rise in the patriarchal period, when land was the chief form of wealth and its chief defense lay in the military strength of its owner. Hence the rise of a class of landed nobility claiming office by hereditary right, the king as a rule being the wealthiest of all. As other forms of wealth developed, its possessors sought political power either through the

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<sup>9</sup> See pages 216-220.

purchase of landed estates or by allying themselves with political leaders who could protect them in their possessions. In modern times, law, backed by the power and authority of the state, seeks to secure to every man equal and exact justice. Under such a system it is unnecessary that the wealthy have special privileges in officeholding, and hereditary right, therefore, tends to fall into disuse. But if the law is not properly enforced, wealthy classes invariably seek, even by corrupt means if necessary, to control governmental machinery so as to secure their interests and perhaps to exploit the weaker under the forms of law. Presumably the masses would do the same, if they had the opportunity, judging from Bolshevism in Russia. If equal and just law is administered, it makes small difference whether the officeholder be rich or poor, or hold office for life or for a term of years. He is but a mouthpiece of the national will, which aims to secure impartial justice to all its citizens alike.

**The Right of Instruction.**—Officials elected or appointed<sup>10</sup> are alike in that each represents, not his own interests, but the interests of the public, and secondarily the interests of the body that elects or appoints him. Unfortunately officials too often consider that they owe greater obligation to the political party that elected them than to the public whom they are supposed to serve. Under the usual theory of representation, an elected representative is not legally bound to obey instructions given him by his constituency. He may choose to obey them

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<sup>10</sup> The distinction between these two words is, that an official appointed, is appointed always by some other official or body of officials. An official elected is always chosen by the electorate or by some elected body, representative of the electorate. A mayor or a president, for instance, appoints, but a city council or a legislature elects.

as a matter of expediency, influenced by the hope of re-election, but should he act otherwise, he cannot legally be called to account for his refusal to follow instructions. Thus, in the United States, a member of an electoral college may be instructed to vote for a certain candidate for the presidency, and he is under a moral obligation to do so, yet if, for some reason, satisfactory to himself, he should vote for another candidate, his vote would be legal and by no possibility could be altered.

In the earlier half of our national history the contrary theory was often argued, and the legal right of constituencies to instruct their delegates was occasionally admitted, especially in the Southern States where Rousseau's teachings had great weight.<sup>11</sup> This aspect survives in the notion that delegates to political conventions, if instructed, must obey instructions. In recent years there is a revival of the "right of recall,"<sup>12</sup> so often discussed in our Revolutionary history, whereby a constituency by a specified vote may cut short the term of office of some officer or representative whose actions are not meeting with popular approval.

**Administrative Districts.**—When, in historical development, the simple village community grows through confederation into a larger unity, the larger organization does not deprive the smaller ones of their administrative powers; it merely assumes the general functions incident to the larger interests involved. This, of course, may involve some supervision over the smaller organizations.

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<sup>11</sup> See Index under Rousseau.

<sup>12</sup> It is being revived, for example, in connection with the commission system of municipal government and in about a quarter of the forty-eight States of the Union. These provide for a recall for "every elective public officer," but four omit judicial officers from those liable to recall. See the author's *Growth of American State Constitutions*, pp. 169-171, 233.

If, at a later stage, through conquest or peaceable confederation, a still larger unity should develop, the same statement would hold true. There would thus be (*a*) a national unity exercising general national powers, (*b*) smaller unities exercising general local powers, and (*c*) still smaller unities exercising petty local powers. All states that have developed some importance will have these three classes of administrative bodies: the national, the local, and the intermediate. The names most commonly applied to the lowest division are the town, or township, and the village, or commune. Within this there may be smaller administrative districts for purposes of convenience merely. The intermediate organization is historically known as the province, in England and the United States of America as the county or shire, and in France at the present time as the department. This division also is frequently subdivided into smaller districts for convenience in administration, in which case each subdivision will contain several townships or communes.<sup>18</sup> If these districts become economically important through commerce, manufactures, and population, they are incorporated as municipalities, or cities (boroughs in Great Britain), and form a grade by themselves. Townships remain as subdivisions or wards of the city. Subdivisions of many sorts are made for purposes of administration in such matters as conscription, education, charity, sanitation, policing, and elections.

If a state is made up by the unification of several states, these former states become important administrative areas intermediate between the province and the national area. The commonwealths of federative governments are such, as, for instance, the commonwealths

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<sup>18</sup> See, for instance, the French *arrondissement* and *canton*.

of the United States of America, the cantons of Switzerland, and the states of the German republic. Such, also, were the counties in Saxon England, the "hundreds" then representing the intermediate grade. In any developed state, therefore, one may expect to find subordinate to the national area, townships or communes, provinces or counties, and cities. If the state is federative, the commonwealths form an additional grade. Subdivisions of these several grades will be found in larger or smaller number according to convenience in administration.

**Local Autonomy or Home Rule.**—Naturally and historically these various districts should exercise full local powers, subject only in general matters to the larger area. This is the modern theory of local autonomy, or home rule, now under discussion in American cities, and regularly a matter of debate in important colonies of great empires. As, however, states have developed policies of centralization, they have interpreted their general powers more broadly, and have pressed their authority more and more vigorously on subordinate administrative areas. This has usually been under plea of military necessity or of needed uniformity or of general welfare. As the strength of this tendency varies with conditions, the degree of centralization varies in each particular state according to the dominant theories of militarism, uniformity, and general welfare. A state in constant fear of attack, like France, must for safety's sake be strongly centralized, whereas Switzerland, neutralized by agreement, can afford to decentralize, except as influenced by notions of uniformity or general welfare. On the whole, three grades of centralization may be noted:

1. That in which the subordinate areas or bodies politic are clearly regulated and supervised directly by the

national administration through its own officials, as in France.

2. That in which the subordinate areas are regulated and supervised indirectly by the national administration, as in England, where in many matters a uniform system is adopted, but the administration of it is left to the local administrative bodies.

3. That in which the subordinate areas practically regulate all their local affairs without much interference from the national administration, as in the relation of Great Britain to its autonomous colonies, and in the relations of commonwealths in the United States of America to their subordinate areas.<sup>14</sup>

No state conforms entirely to any one of these types; the most centralized government may allow large local powers in some matters, and the most decentralized may employ large general powers in such affairs as war, diplomacy, and taxation. The test is made by the theoretical principle on which government acts, irrespective of whether at any particular time it seems expedient to use many or few powers of regulation. Just how much home rule should be left vested in the subordinate divisions is a question of policy largely to be determined by conditions. There must be taken into account on one side the general intelligence and public spirit of the communities themselves, and on the other the necessity for emphasis on broad general interests as against localism and incompetency. No theory is, in itself, always and everywhere true. Wisdom, in rightly interpreting the conditions of the times, must guide in settling on a policy of home rule, or centralization.

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<sup>14</sup> For a study of American local government with a comparative background see N. G. James, *Local Government in the United States*.

**Japan's Administrative System.**—As an illustration of extreme centralization, yet with beneficial results, attention may be called to the system of administration employed by Japan. It may be remembered that in 1867 the system of feudalism under the Shogunate yielded to a reorganized, centralized government under the Emperor. Lacking experience in modern governmental practices, Japan long wavered in seeking to decide on the models after which it should reorganize its government. After many indecisive experimentations, in 1881 the Emperor announced that a constitution would be promulgated within ten years. Count Ito at the head of a commission was charged with the preparation of this and did so, modeling it after the German Constitution, under the influence of Bismarck. The Constitution was put into effect February 11, 1889 (henceforth a national holiday), and has proved to be remarkably effective, due mainly to the highly centralized system of administration developed. This was necessary since the general ignorance prevailing in those days in respect to Western civilization and world politics made it expedient to concentrate power into the hands of the comparatively few who did understand the world situation, and hence could best formulate effective policies. The great leaders of these few experts in time became known as the Elder Statesmen, and are reverenced like the "Fathers of the Revolution," because of the carefully planned system they evolved.

Two factors were of great aid to them in their task: (a) the fact that the Emperor was in general estimation a god by descent and gave them most hearty support throughout his long reign and (b) that the Japanese, being naturally militaristic, yielded readily to guidance

and leadership, and especially devoted themselves assiduously to preparation and training in army or navy, thus insuring victory in their several wars.

The task before the leaders was to direct the energies of the Japanese into modern directions, by forced processes as it were, since they could not wait for the slow growth of democracy to accomplish results. Governmental power, therefore, was concentrated into administrative departments, highly centralized and largely free from Parliament, since the Lower House has little control over finance or appropriations. Deprived for the most part of the "power over the purse" the Lower House became and is a sort of debating society, with small powers, and in any case voices only the propertied classes, since suffrage is restricted by a taxpaying qualification for voters of three yen (\$1.50) paid as a direct tax.<sup>15</sup>

Since governmental power with few restrictions was concentrated in a closely centralized bureaucracy, this body through its leaders could determine policy and furnish the finances requisite for the execution of the policy determined on. As a result of this concentration of authority the government was able to establish and subsidize whatever agencies seemed likely to be of use for national prosperity. For example, a thorough system of education was established and made compulsory in its lower grades. In its higher grades specialization begins and capable young men are stimulated to study through college and university with a virtual guaranty that successful candidates will find careers open to them in the great industries, in the professions, or in governmental

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<sup>16</sup> On the older basis of a ten-yen qualification, down to 1918, the voting population was about 3.3 per cent of the whole.

service. The teaching profession is dignified and the most successful graduates from the universities pass readily into the first grades of governmental service, thus insuring to the bureaucracy a steady stream of young men of the highest intelligence and technical knowledge and skill. Upon these heavy responsibility is placed and tangible results are expected. Failure on their part means discharge, disgrace, and probably suicide.

Based on such a foundation the government has found no difficulty in stimulating through its various departments an efficient banking system, ship building, a merchant marine, scientific agriculture and forestry, many varieties of manufacturing industries, and fishing and mining.

Meanwhile it has fought successful wars with China and Russia, coöperated with the Allies in the Great War, enlarged its possessions by the inclusion of Korea, and has other claims along the eastern coast of Asia and over the former German islands north of the equator. Obviously Japan presents many object lessons of the efficiency of a highly trained centralized bureaucracy actuated by patriotic motives and through it has reached a place among the great powers, probably ranking as third in order. For a whole generation (about thirty-five years) the bureaucracy has guided the destinies of Japan with great success. Whether the pace can be kept up for another generation remains to be seen. The tide of democracy is rising rapidly in Japan and democracies are rarely efficient. Then, too, bureaucracies unchecked by public opinion tend to develop red tape and to become corrupt. A militaristic imperialistic efficiency also usually fails to take into account the racial psychology

of other nations and may readily arouse international jealousies and enmities. At this particular time it looks, for instance, as though Japan has permanently estranged the Chinese and has not a real friend in the remaining world of international states.

## CHAPTER XIV

### THE JUDICIAL DEPARTMENT

**The Judicial Function.**—The chief function of the judicial department is to interpret the law and to apply its penalties and remedies in all cases brought before the courts for their decision. This power is fundamental to the successful workings of government, which by nature is coercive and must have authority to enforce by penalty its decisions. Such a power is essentially executive and was originally wielded by the elders and later by the chiefs or the king. In modern states judicial authority has differentiated into two great branches, one exercised by the executive department as formerly and the other by a separate department devoted to judicial functions only. This latter department is concerned chiefly with alleged infractions of the law by private persons and with disputes between private persons in regard to property rights. That part of the judicial function residing in the executive department is concerned mainly with the enforcement of discipline in the army and navy, or in the civil service, and in the settlement of disputes arising under administrative rules.

**Executive Judicial Power.**—As law in the primitive state was simply immemorial custom, binding on all persons alike, infractions of it were few and far between. The chief business of the state in those times was war, and the judicial function of the state probably had its

origin in proceedings against those who failed in the customary duties and obligations of war. The procedure in such cases was short and the punishment severe. This original judicial power of the state survives in treason laws and in the jurisdiction exercised by the executive department through its control over discipline in the army and navy. This power is not exercised arbitrarily in modern states, but in accordance with constitutional or statutory provisions supplemented by "rules and regulations." Under this power courts-martial may be authorized to enforce discipline by bringing offenders "to a more exemplary and speedy punishment than the usual forms of law will allow."<sup>1</sup>

Another illustration of this judicial power may be observed in times of riot, insurrection, or public danger, when the authority of executive officers or of courts-martial may supersede the authority of the ordinary courts of the land in respect to cases involving the peace and safety of the state. The exercise of this power is carefully safeguarded in modern states by legal provisions in regard to the time and manner of its exercise, and by holding responsible for the proper performance of their duties those who wield this extraordinary power.

A third form of this kind of judicial function is seen in the arbitrary power exercised by courts in maintaining their dignity by punishing violations of judicial orders. This power to punish arbitrarily by fine or imprisonment for "contempt of court" is a real power even at the present day as seen in labor troubles in the United States of America in the injunction cases affecting Debs (1895), Mitchell and Gompers (1908), and Howat (1919). Historically, of course, the court is merely a department of

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<sup>1</sup>First Mutiny Act, England, 1689.

administration under the king and punishes for contempt of his commands. Lawmaking bodies in a similar way exercise such judicial powers in matters affecting their dignity, privileges, or membership. In general it will be observed that monarchies contain many interesting survivals of broad judicial powers that still reside in king and council. Illustrations could be multiplied, but the judicial power exercised by privy council under the English Tudors, or by the present house of lords, the descendant of the Saxon *witan* and the Norman great council, will readily suggest the application.

**Administrative Courts.**—An extension of this idea of executive judicial power, developed and maintained by the executive so as to strengthen its importance as against a judicial system proper, may be found in those states (for instance, in practically all of the European Continental states) that have a separate system of courts, known as administrative courts, for trying cases in which officers of the civil administration are charged with criminal or illegal acts committed in connection with the discharge of their official functions. The idea underlying such a system of courts is that civil officers in the discretionary performance of their public duties may not infrequently have occasion to violate the ordinary law of the land. In such case they should not be tried in the ordinary courts, but by their superior officers, who from their understanding of the situation can best decide as to the necessities of the case. This theory of official responsibility does not find favor in English-speaking communities, which prefer to make official and private citizens alike responsible ultimately to the same law. The practical effect of an administrative system of courts is (*a*) to develop a simpler procedure and law for officials

in respect to their administrative acts, (b) to mingle notions of expediency with principles of abstract justice and (c) to develop a bureaucracy of special privileges in part above and outside of the ordinary law of the land.

**French Administrative Courts.**—As the French system of administrative courts is the model after which other Continental states have patterned, a brief statement of its history and importance may be found useful.<sup>2</sup>

In the centuries immediately preceding the Revolution of 1789, the ordinary judicial bodies, the provincial *parlements*, were not unified into a great national system as were the courts in England, while on the other hand the national administration was rapidly centralizing its powers and adding to them. Naturally, therefore, the administration vigorously resisted attempts on the part of the courts to exercise jurisdiction over the acts of its officials, and began the process of organizing special courts of its own. In the famous Declaration of Rights of 1789, the theory of Montesquieu in respect to the separation of powers was expressly included and emphasized; but in the following year the Assembly by law logically interpreted this to mean, in the light of French history, that the courts should never be allowed to interfere with acts of administrative officials done in the performance of their duties. Still, in order to safeguard citizens in their rights, provisions were carefully made for appeals from subordinate to higher administrative authorities. Since that time the place and importance of court, law, and procedure have been carefully worked out

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<sup>2</sup> For fuller explanations of the French system and numerous references, see Goodnow, *Comparative Administrative Law*, vol. ii, Chap. VI; and Lowell, *Governments and Parties in Continental Europe*, vol. i, pp. 47-68. These works also explain the administrative systems of certain other countries.

into the present admirable system of an administrative judiciary.

As at present organized, the center of the entire system, the court of last resort, is the judicial section of the Council of State, which body is composed of the ministerial heads of the great departments of administration and of numerous permanent administrative officials of high grade. Below the judicial section of this Council are the Prefectural Councils, each made up of the Prefect of the Department as nominal president and of councilors appointed and removed by the President of the Republic. Prefects, and in the communes the mayors, serve as judges in certain petty cases. Within the department there are other specialized courts, such as the superior council of public instruction, coördinate with the Prefectural Council but lacking its importance. These also are, of course, subordinated to the Council of State.

**Administrative Law.**—In France a sharp distinction is made between public and private law. As administrative officials in the performance of their official duties administer public law and apply it to cases arising in national administration, they under French theory should be free from the jurisdiction of the ordinary courts, which adjudicate only on the rights and duties of private individuals.<sup>3</sup> Officials are, therefore, in fact placed under authority of the administrative courts, which use a procedure and law different from those of the ordinary system. These courts in rendering their decisions rely chiefly on precedent, based on the interpretation of statutory authority or ordinances issued by the

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<sup>3</sup>In France criminal law, which according to English theory is public law, is for the most part adjudicated by the ordinary courts.

administration. As public policy must be taken into account as well as principles of abstract justice, the courts naturally use a loose interpretation, a flexible procedure and notions of expediency. This is all the more possible since they are not really bound to follow the law too closely, for the reason that the final decision on appeal lies in the Council of State, itself an administrative body, and not subject to the general courts using the private law of the land. Still, as there is a large freedom in appeals, an ordinary citizen will, as a rule, obtain a just decision at small expense and with slight delay in the administrative courts. He may, however, not secure exact justice, or even justice at all, if the case assumes a political aspect and governmental policy seems to demand a partisan decision.

**American Administrative Courts.**—This system of law is, of course, at variance with the English-American theory, which subjects every governmental official and his acts to the final jurisdiction of the general courts of the land. Yet there are approximations to the French system in, for example, the series of military and naval courts administering in separate courts a special law and procedure. In some of the departments of administration also, such as, for example, the Treasury Department in the United States, there are semi-judicial bodies to render decisions on disputed interpretations of law and ordinance, such as, for instance, the proper charge in customs duties. The rise of administrative commissions, national and local, such as commissions in regulation of interstate commerce or of federal trade or of quasi-public corporations holding franchises, authorized to render judicial decisions on matters intrusted to them, is another illustration of the same development. Yet

though these are differentiated, and their decisions are "due process of law" as truly as are the judicial decisions of the usual courts, they are not separated and given co-ordinate jurisdiction. They are subject to the law of the land, their decisions are supposed to harmonize with statutory laws and with the constitution, and may ultimately be brought for final review before the general courts of law.<sup>4</sup>

An illustration of judicial power exercised by a law-making body is seen in the development of the impeachment power. When the English Parliament in its earlier years was seeking to make the King's Ministers responsible to it, an effective weapon was found in the *bill of attainder*. This bill simply named the offender, declared him guilty of high crimes, and ordered his execution. It was an arbitrary method of removing an obnoxious Minister without form of trial and was certainly effectual. At a later stage, as a concession to popular prejudice in favor of a trial, an obnoxious Minister would be formally charged by one House with crime, tried by the other, and declared guilty as a matter of course. This method also was effective but unjust. By the time public sentiment had risen to a height where it demanded a fair trial on impeachment, Ministers had been made responsible through elections and the reform of the parliamentary system. Under such conditions impeachment has become practically unnecessary. In the United States of America bills of attainder are forbidden by the Constitution and though impeachment is authorized, yet such

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\* See T. R. Powell, "Conclusiveness of Administrative Determinations in the Federal Government," *American Political Science Review*, August, 1907, pp. 583-607; and for a more complete discussion see, Kimball, *National Government of the United States*, pp. 232-241.

a method of trial is so tedious, cumbersome, and barren of results that it has almost become obsolete.<sup>5</sup> Public opinion, the courts, elections, and compulsory resignation from office or the recall, furnish the usual methods whereby public officials are made responsible in the performance of their duties.

**Development of the Judicial Department.**—These historic judicial powers residing in the executive, and in the legislative as an outgrowth from the executive, represent the original judicial powers residing in government. In those times all other infractions of custom and disputes of all kinds were settled by private vengeance or compromise. As this system of vengeance passed under the jurisdiction of the state, the executive exercised this new judicial power also. But as the burden of administration grew with increasing jurisdiction, it became necessary to separate this judicial business from the ordinary business of the executive and to delegate it to a separate set of officials, who devoted themselves to the knowledge of the law of the land and the principles of judicial administration. This separation, however, was for a long time largely nominal. Though the distinction in regard to the kind of function was early established, the development of a distinct set of officials devoting themselves to judicial business came much later. The same officials administered executive business as assistants of the king, sat in the council and advised him in matters of national policy, and, in case of dispute, declared what was in their opinion the law of the land. They would then as judges sit on the king's judgment seat, decide cases,

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<sup>5</sup> See article by D. Y. Thomas, "The Law of Impeachment," *American Political Science Review*, May, 1908. The process of seeking to make a ministry responsible to a parliament, or to its lower house, may be illustrated by present agitations in Japan.

and punish violations of the law. Such a system, however, best suits small states of comparatively simple administration. As civilization becomes complex and as states increase in population and wealth, thereby multiplying personal and property rights, a further differentiation becomes inevitable. Judicial functions pass into the control of a specialized class, who by practice and training become expert in the law.<sup>6</sup>

The next development results from the rise of democracy. Judicial jurisdiction practically covers the entire population. Any person may at some time or other be charged with a violation of law or be concerned in the settlement of property rights. All, consequently, become interested in having the courts decide justly and honestly cases brought before them. Venal judges and corrupt decisions have always been denounced, and even-handed justice for all men sought as the ideal. For such reasons a developing democracy intuitively seeks to control the courts so as to insure greater justice. As it gains power and intelligence it becomes able to control more fully the organization of the judicial system, the appointments to office and the quality of the law, and demands the use of a jury<sup>7</sup> of their peers (*pares*) for all as a safeguard against judicial tyranny, and the removal one after the other of the special privileges of favored classes,

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<sup>6</sup> For early development of the English judicial system see Stubbs, *Constitutional History of England*, vol. i, Chaps. XI-XIII; or for a brief statement of development to 1873 see Inderwick, *The King's Peace*.

<sup>7</sup> See Lesser, *History of the Development of the Jury System*. See also C. H. Haskins, "The Early Norman Jury," *American Historical Review*, vol. viii, p. 4; W. B. Scaife, "Some European Modifications of the Jury System," *American Historical Association*, 1894, pp. 125-140; B. E. Howard, "Trial by Jury in Germany," *Political Science Quarterly*, vol. xix, p. 650; Matias Romero, *Mexico and the United States*, pp. 401-428, article on "The Anglo-Saxon and Roman Systems of Criminal Jurisprudence."

so as to make all men equal in the eyes of the law (*pares inter pares*). Naturally enough, kings stoutly resisted this developing independence of the judiciary, but in democratic communities they resisted in vain. In such states we find a judiciary and judicial department to all intents and purposes free from the domination of the executive, administering a law approved by representatives of the people, and rendering decisions with impartial purpose and theoretically without distinction of persons. In monarchies the king may still by theory be looked on as the head of the judicial system, but his power is nominal and is exercised chiefly by tempering judicial punishments with mercy through the exercise of the pardoning power, which is still held as an executive prerogative.

**Privileged Classes.**—The modern theory of law is strongly democratic in that the state aims to treat every man alike before the law. Ancient systems were founded on far different principles. Even in primitive times, when a rude democracy characterized the horde, the elders had special privileges, and women and children were too often considered as having no rights that a man was bound to respect. The caste system of India illustrates the extreme development of special privileges according to social grade. The people are carefully divided into castes, and legal rights are based in accordance with the quality of the caste. Similar distinctions existed and do yet exist in autocratic or aristocratic monarchies. Special privileges were held by the nobility as the military-governing class, and by the clergy. Below these were freemen, freedmen, and aliens, with rights as against one another but with small rights as against the nobility. At the bottom of the scale were slaves, this class of the

population having almost no status or rights in the eyes of the law.

Equality before the law under such a system was impossible. Crimes might be committed with impunity by members of the higher classes that would bring condemnation and severe punishment if committed by members of the lower classes. The testimony of the one far outweighed the testimony of the other. This brought about conflicting ethical standards and degradation of morals. As the influence of the common people developed, they fought vigorously for equality of rights for all freemen, and as slavery disappeared that meant for all men. Slowly the plebeians or commoners won rights and deprived the higher classes of special privileges, until with the full tide of democracy in the nineteenth century the virtual legal equality of man has been accepted by many progressive states.<sup>8</sup> There are still class distinctions based on social rank, wealth, and birth, but these are rapidly disappearing in judicial matters. As a matter of practice, even in democracies, courts make real distinctions almost unconsciously between the wealthy and the poor, between social leaders and social inferiors, between persons of respectability and responsibility and their opposites. All this is natural enough under the circumstances of modern life; but the democratic movement is slowly removing in modern states all legal distinctions between man and man, save those based on character and social utility.

**Systems of Courts.**—The judicial system of any modern state is complex and confusing to the layman,

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<sup>8</sup> Cromwell in one of his speeches declared that "every single man is judge of just and right as to the good and ill of a kingdom." It is the ancient teaching of Protagoras, "man is the measure of all things."

yet there are certain natural lines of development easy to follow that readily suggest the clew for any given system. In criminal matters there will regularly be three grades of courts. In the first, or lowest, grade there will be found established in every small district of sufficient population a court whose jurisdiction is limited to the summary disposal of petty crimes or misdemeanors or to the commitment of the accused person to the court of next higher grade. This higher court will have jurisdiction over cases involving serious crimes and severe punishment. The third and highest court may be authorized to try special forms of important crime and will hear appeals from the lower courts. When a final decision is rendered, the only recourse left to the convicted criminal is a petition to the pardoning power, which may, from the standpoint of mercy, modify to some extent the amount of penalty inflicted by the courts. Kings formerly claimed the right to suspend or waive the application of the law in the case of particular persons charged with crime, but such powers are not consistent with a theory of equal justice. In civil cases a threefold classification is also common. There is a local court for petty cases, a court for disputes involving more important property rights and a supreme court for specified classes of important cases and for appeals.

**Equity Courts.**—In England inequitable decisions rendered by the common law courts, due to the defects or omissions of the common law, formerly might be appealed to the king as the fountain of justice, who would personally remedy the defects of the law by a special decision, or might delegate the power of investigation to a special official or body of officials, who thereby became a court. In this way was developed in England the Court

of the Lord Chancellor and the system of equity law, having an especial body of principles and rules of procedure and a jurisdiction peculiar to itself.<sup>9</sup> In modern times an appeal for remedy in the form of a petition may be sent to the lawmaking body which, as the maker of law, may correct the injustice of judicial decisions in individual cases, unless restrained by constitutional prohibitions.

The best illustration of the process of introducing equity into custom can be obtained from a study of the development of Roman law. The harsh and crude customs of the early law as codified in the XII Tables were slowly modified by equitable principles introduced by *prætor*, commentator, and emperor, until after a thousand years of constant modification (450 B.C.—Justinian's Codification, 529-539 A.D.) the civil law of Rome stood forth as probably the most valuable contribution of Roman civilization to its modern successors in western Asia and Europe.<sup>10</sup>

**Specialized Jurisdiction.**—The comparatively simple judicial organization outlined above may become more complex by the multiplication of administrative functions. Great masses of specialized business may be set apart and handled by special systems of courts patterned in general after the national system. If, for example, church and state be united, there may be a special series of ecclesiastical courts to consider cases involving ecclesiastical law and the clergy. Foreign commerce in-

<sup>9</sup> In 1873 these two systems of courts, by the Judicature Act, were combined into one system; but see Inderwick, *The King's Peace*, pp. 222-232.

<sup>10</sup> For brief volume see Morey, *Outlines of Roman Law*, revised edition. In the Bibliography see also Section III and note works under names Sherman, Sohm.

volves a system of admiralty courts and of consular courts, to exercise jurisdiction over cases arising on the seas or in foreign countries. There may be a special series of courts for the regulation of family rights as in courts of probate and of divorce, or domestic relations courts, or courts for the separate trial of juveniles. Generally speaking, the development of a specialized line of judicial jurisdiction tends to result in the formation of a special court or series of courts for the settlement of such cases, or if not, then the grade of court that naturally would have jurisdiction over such business may sit in several divisions, and one of these given jurisdiction over a particular kind of case.

Again, complexity in organization may be increased by the multiplication of administrative areas beyond the ordinary areas of township, country, and nation. In this event the jurisdiction of the first and second grades of courts will probably be subdivided for the sake of convenience so as to suit the needs of the additional areas. Or the development of a federation with its dual form of government will duplicate the judicial system of the state as a whole. Or, in addition to the ordinary national systems of courts, there may be a territorial system, a colonial system, or the system of a former state now subordinate. In such instances each system should be studied by itself and then the connecting links that bind together the several systems into one common judicial system.

#### **Administrative Aspect of the Judicial Department.**

—In addition to the several series of courts for the trial and settlement of cases, there is a complicated administrative mechanism to supplement the work of the courts. In order to bring cases properly before the courts there

is a large body of persons acting as police officers, or constables, to aid in carrying out its functions. As the state now prosecutes in criminal cases, there is a corps of prosecuting lawyers in the employment of the state, aided in their initial work in English-speaking countries by the grand jury. Cases may be settled directly by a judge or a bench of judges, or a petit jury may be used to aid in the decision. Punishment in ancient states was administered on the spot, but in modern times long delays and imprisonment often follow the verdict. This involves a complex system of prison administration and places of detention. The entire procedure of judicial administration, from the formal charge and arrest to final conviction and punishment, is carefully worked out in modern judicial systems, and every effort made to give the accused a fair and speedy trial, with every possible opportunity to make his defense and if possible to prove his innocence. So detailed have these precautions become that justice is often thwarted by overemphasis on safeguards, resulting too frequently in the acquittal of guilty persons, thus creating contempt of law and mob violence. In democracies, a speedy procedure, impartially and rigidly administered, and the surety of punishment in case of guilt are the safest means of securing justice and respect for law.

**Legal Penalties.<sup>11</sup>**—In criminal matters, the essence of judicial decision is the infliction of a proper penalty for violation of law. As the early jurisdiction of the state lay chiefly over military offenses, other offenses were visited with penalty by the social agencies of the time. Many of these still survive, but with considerably modified powers. A church, a school, or a social organi-

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<sup>11</sup> See pages

zation may discipline or punish its members, parents may within reason punish their minor children, public opinion may ostracize or otherwise punish offenders of social decorum, and individuals occasionally undertake to inflict punishment in return for private wrongs. By present theory the entire power of punishment inheres in the state as the keeper of the peace, though in deference to long-standing custom it may permit the power of punishment to such agencies as those above mentioned.

**The Four Stages of Punishments.**—The infliction of penalty has passed through several well-defined stages, one or several of which can be traced in the history of each of the existing civilizations. Many curious survivals of ancient stages of punishment may still be found even in the most highly developed civilization.

1. The first period is that of revenge. Penalty in all its forms was savage and cruel. Man's nervous system was in primitive times less highly organized and endured pain more easily; the mental suffering through the imaginative anticipation of pain was lacking; human sympathy was a rare quality and belief in the sacredness of human life hardly existed. Punishment was ruthless, often out of all proportion to the crime, and frequently involved the innocent with the guilty, under the ancient theory of collective responsibility either of family, clan, or fraternity.

2. As notions of justice developed in men's minds, the desire for revenge became modified into the principle of retaliation. Every offense was to be atoned for by a similar punishment. It was the period of *lex talionis*, an eye for an eye, a tooth for a tooth, no more, no less.<sup>12</sup> This system also was cruel, but yet in its attempt to se-

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<sup>12</sup> See Exodus XXI, 23-25.

cure justice it was an improvement over the vindictive system of the earlier stage.

3. With the rise of personal property there came a strong tendency to atone by the payment of a fine for all but the worst crimes, blood penalty being exacted only from the vicious criminals or from those who were unable to pay fines. Under this system there was a carefully graded list of offenses, each valued at a particular fine, varying in amount with the social rank of the injured person. The fine in early times was paid partly to the injured and partly to the state. Confiscation of property is simply a variation of this form of punishment. With the development of slavery, punishment for crime might, in default of the payment of the fine, result in the sale of the criminal and perhaps of his family also into slavery for a term of years or for life. As slavery disappeared, this form of punishment survived in sentences that condemned men to labor in mines or on governmental works, to serve in the army or navy, or to labor as servants to private citizens who employed this convict labor on plantations, in mines, or in various industries.

4. Another stage of punishment developed when the courts undertook to deter men from crime by the infliction of cruel punishments. This was effected by imprisonment in noisome dungeons, by burning, mutilation, whipping, branding, and torture developed to its highest pitch by human ingenuity. Nothing in these days can be said in justification of such a theory. Experience shows that severity of punishment does not deter men from committing crime. The infliction of it in public even tends to multiply crimes owing to the fascination involved in such awful notoriety. Judges and jury would

hesitate in modern times to inflict such punishments and they are regularly forbidden by law. Nevertheless, they are still inflicted under lynch law at times when men are overcome by violent passions and vindictive emotions.

**Torture and the Ordeal.**—In mediæval Europe, as well as throughout the Orient, a belief in the efficacy of torture resulted in its use in the case of persons strongly suspected of crime, against whom, however, there was insufficient evidence to convict, or whose evidence it was thought might inculpate others. These persons were put to the torture on the theory that persons suffering bodily anguish will tell the truth.<sup>13</sup> The fact is, that as a rule they will tell anything their torturers wish them to confess. The use of torture was strengthened by the belief that, if only guilty persons could be brought to confess the truth, it would help in the salvation of their souls—a theological teaching that resulted in the damnation of more souls than it saved. A peculiar form of trial followed by punishment developed in early Europe and in many other parts of the world as the result of religious ideas. When men desired to do justice and yet realized how imperfect judicial machinery was in the detection of crime, it occurred to them that the guilt or innocence of the accused might safely be left with God.<sup>14</sup> In consequence there developed a system of ordeals, oaths, and judicial combats, the outcome of which determined the punishment or acquittal of the accused. On the face of it such a system seems puerile, and it is; yet it had its utility in a credulous age where all men really believed

<sup>13</sup> A modern but illegal form of it is sometimes practiced in our detention prisons and is known as the "infliction of the third degree."

<sup>14</sup> See Lea, *Superstition and Force*.

that God would in every trial strengthen and protect the innocent and weaken the guilty. It failed when men lost faith in God's intervention in such matters, and devised ways and means of evading the chances of failure by bribery and trickery.

**Modern Penal Systems.**—The penal systems of the nineteenth century present a complex of many former stages. Hanging for murder is a form of *lex talionis*. Hanging for other crimes, and solitary confinement aim to deter the commitment of such crimes. The system of fines carefully graded to fit each offense is still in vogue but reserved for minor crimes. More serious offenses are usually punished by imprisonment, not so much to deter others from crime as to segregate criminals from social life. Nor are prisons as a rule horrible dungeons as formerly; they often furnish far better accommodations than those the average workingman enjoys. Prisoners are still compelled to work, but rather with the thought of utility to the prisoner than of actual gain derived from his labor.

Modern penal systems are undergoing rapid transformations. Prevention and reformation are the watchwords of the twentieth century. Careful study of the causes of crime, a better knowledge of psychology and of the respective influences of heredity and environment give grounds for hope that a large part of crime can be prevented and that many criminals can be reformed and made into useful citizens. It is argued that the irreclaimable should be kept imprisoned permanently for their own sakes, and especially for the sake of society. Such theories are rapidly modifying the methods in use. Probation and right training in reform schools are taking the place of the fine and the prison, and habitual

criminals are permanently imprisoned under indeterminate sentences that they may no longer have opportunity to commit other serious crimes. In short, society aims to give every person a fair chance, and to protect itself fully against those who refuse to avail themselves of it.

## CHAPTER XV

### THE LAWSMAKING DEPARTMENT

**Rise of Opposition to Autocracy.**—As the wealth and population of a state increase, it becomes more and more difficult to govern along autocratic lines. Numerous interests arise which do not receive adequate attention from the rulers; men whose capacity and attainments deserve recognition are slighted; and the private interests of ruling classes absorb most of their energy, to the neglect of public interests. Under such conditions there are historically several possibilities of action:

1. The *status quo* may be maintained and discontent suppressed by force, in which case the state would probably slowly decay until absorbed by some rival after defeat in war.
2. A system of decentralization may be encouraged, and each important province be allowed to regulate its own affairs subject to tribute and a nominal supervision, the provinces being held together by mutual interests.
3. The central authority may retain its power but gradually develop a system of representation whereby important interests and persons may receive due recognition.

This last possibility involves a national application of the idea contained in the organization of a primitive horde or village community. All interests and persons of importance were included in the small gatherings of

these early groups. Even in confederate tribal life the idea had survived in the periodic gatherings of heads of tribes and districts to administer general business. So likewise in the assemblies of the democratic city states of the classic period, every important citizen was able to make his influence felt in the assembly if he were so inclined. The difficulty was to apply the principle to a great national system, and no ancient state ever proved equal to the emergency. Representation in local government was common enough, and representation of privileged classes in great councils was known, but no system was devised whereby the interests of all the people might be represented in a great national government.

**The English Parliament.**—Through a series of events natural enough in themselves, there developed in England during the thirteenth century an assembly of delegates, who represented the common people and petty nobility, as distinguished from the usual assembly of the higher nobility and clergy in the great council. Such an assembly was by no means an anomaly at that time. A rude form of representation existed among the Scandinavian people as early as the ninth century. About the tenth century the Icelandic Althing<sup>1</sup> and the Tynwald<sup>2</sup> of the Isle of Man (which still survives) were established. These were made up of elected delegates who prepared laws, which were promulgated as the law of the land. Similar bodies may be traced in other countries of Europe, but they did not attain political importance. The English Assembly came when that country was

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<sup>1</sup> Constitution of Ulfriot, A.D. 930. See Bryce, *Studies in History and Jurisprudence*, Essay V.

<sup>2</sup> See Caine, *Little Manx Nation*.

breaking away from agriculture and developing commerce and manufactures, and when kings, ever engaged in war or the suppression of rebellion, were forced to rely more and more upon the support of the common people and on taxes raised from urban centers. So constantly was the King in need of money grants and military support, that the first two hundred years of the history of the Assembly of the commons marked an almost steady growth in its power and prestige, since the King to secure their support would grant their petitions or bestow privileges. During the sixteenth century the historic Council of nobles and clergy, who formed the House of Lords, was relatively weak. This was due to its depletion in numbers owing to the civil wars and to the nationalization of the church, which deprived that body of much of its power and representation. In consequence the two houses during the Tudor period were fairly equal, and were firmly welded together into a Parliament. The rapid development of commerce and manufactures under the Tudors and Stuarts (1485-1688) gradually transferred the balance of power from the Lords to the Commons as the representatives of these interests, and the rise of Great Britain to world supremacy in the nineteenth century made the Commons supreme in governmental policy.

**Importance of a Lawmaking Body.**—The political importance of this development lies in the fact that it revolutionized men's notions of governmental machinery. The ancient principle of governing through privileged classes, basing their claims on noble birth and landed wealth, was superseded by a system of government through persons who represented most of the important interests of the state, and who had influence in propor-

tion to the weight of interests and the proportion of the population they represented. The economic advantages of such a system were so plainly manifest that other nations found it expedient to imitate it, modifying the English system to suit their own peculiar needs. In this way developed the modern bicameral legislative body, the center and pivot of the modern democratic movement.

Naturally enough, some of these systems of legislative representation are not truly representative, but it must be understood that a true system of representation is an ideal toward which modern governmental organization approximates. Much of the dissatisfaction arises from the composition of upper houses, but these usually have little power if they fail to voice the true interests of the nation. States are constantly experimenting with newfangled devices for the improvement of governmental machinery. Hence such suggestions as those for minority or proportional representation, the representation of interests, the use of the initiative and the referendum, improved primary and electoral laws, and the regulation of political parties. It is not to be assumed that an ideal system of representation would be best under existing conditions. It would demand for its exercise a lively intelligent interest in public affairs by all the citizens, and that condition has hardly been yet attained in any state. For this reason a system in which the balance of power is in the hands of the wealthy and intelligent classes may prove more successful in some states than a strongly democratic system. Every state, however, should endeavor to increase the prosperity and intelligence of all its citizens, and to expand its system of representation so as to include all persons who have a

tangible and intelligent interest in the welfare of the state.

**Bicameral System.**—The chance development through social distinctions of the English Great Council into two houses set the fashion for other states also. The confederation of the United States of America preferred a unicameral Congress, and this was favored for a time by Revolutionary France. This French system was imitated by several of the other Latin states and still survives in Central America and in Santo Domingo and in many of the commonwealths of federations, outside of the United States of America, which still retain the bicameral system. The best argument for the bicameral system seems to consist in the opportunity thereby allowed for the balancing of varying interests and the consequent check on too hasty legislation.

**Composition of the Lawmaking Body.**—Historically the prototype of the lawmaking body was the collective body of elders found in all early states. In this gathering met all persons of consequence in those petty communities. When the state had arisen to the dignity of a kingdom or empire, the council consisted of royal princes, great nobles, heads of administration and religion, and of persons famous for their wisdom.<sup>3</sup> In classic times there grew up a more numerous council or assembly, supplementing the work of the older body, and including in its ranks the warriors, freemen, or citizenship of the state. The feudal councils of mediæval monarchies emphasized the necessity of the representation in the king's council of all important districts through their leading nobility. As municipalities (boroughs and

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\* The Vermont Constitution still assumes that legislators are persons most noted for wisdom and virtue" (Chapter II, Sec. 36).

cities) became important through their wealth and population, these, as already explained,<sup>4</sup> were deemed worthy of representation through delegates appointed or chosen by the corporations of the municipalities. The representation of shires, or counties, in the English system virtually meant at first representation of the lesser nobility, so that the House of Commons was made up of representatives of borough interests and of the smaller landed estates. When modern democracy began, emphasis was placed on human beings, irrespective of rank, official position, or wealth. These developments broadly illustrate the various factors that enter into the composition of lawmaking bodies. These bodies, in other words, are made up of heads of communities and men of personal capacity, persons of dignity who represent nobility of birth, large landed wealth, or important offices in church or state; persons who represent the collective wealth of a locality or persons who represent collective bodies of men irrespective of wealth. Monarchies regularly emphasize birth, social standing, office, and wealth; democracies incline to emphasize persons and wealth. In future developments it is likely that corporate interests will form a basis of representation; such interests, for example, as manufactures, commerce, agriculture, labor unions, and the professions, possibly through the representation of these in an upper house.

In modern monarchies the lawmaking body has its upper house, made up of members of the nobility and of the chief dignitaries of administration and religion; its lower house will generally be composed of representatives from localities, on the basis of wealth or popula-

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<sup>4</sup> Page 236.

tion, but as a rule discriminating against the poorer and illiterate classes. Republics seek to embody in the upper house the more conservative elements of the state, as against the more radical elements in the lower house. In federations the commonwealths are represented as such in the upper house, sometimes equally as in the American system, but often unequally as in Germany, owing to the wider difference in the size and importance of the several states. Areas of equal population or a taxpaying citizenship are commonly represented in lower houses. In the commonwealths of the United States of America, the tendency is to make the upper house represent population areas about three times as large as those of the lower house. As a rule there is no fixed principle in regard to the relative size of the two houses. The upper house is regularly, but not necessarily, smaller than the lower. Large lawmaking bodies are so cumbersome and inefficient that the tendency is to reduce the absolute numbers in both houses of legislatures, but many local factors modify this tendency.

**The Initiation of Bills.**—In conservative monarchies, kings or emperors regularly initiate all bills through their ministers. Members by favor may make suggestions in the form of petitions. In democratic constitutional monarchies the king's ministers are responsible to the parliament so that they no longer voice the monarch's wishes. As a rule also all members have the right to introduce bills and regularly do present bills of a local or private nature. It has, however, become the practice to allow only party leaders, or a responsible ministry, to present bills of importance. Such bills are prepared with great care and represent the policy of those in power. In republics the members of either house

may initiate bills except perhaps money bills.<sup>5</sup> In some federations the commonwealths may have the right to introduce bills directly, as in Mexico, or in democracies the electorate may exercise the same privilege through the initiative.<sup>6</sup>

Besides these formal methods of initiating legislation, there are other ways whereby matters involving legislation may come before the legislature:

1. The executive may make suggestions to the legislature requesting legislation along specified lines. Such suggestions are frequently made by administrative departments with the approval of the executive.
2. Committees or commissions are frequently authorized to consider questions of policy and to recommend to the legislature suitable lines of action.
3. A citizen or body of citizens may exercise the right of petition and request the legislature to grant relief in certain specified matters. The legislature is not bound to follow such suggestions, and may ignore them altogether or adopt them as may seem most expedient at the time. Whenever it may seem advisable, legislatures may authorize the holding of public hearings, at which all persons interested in the success or defeat of the proposed bill are invited to be present and present their reasons. This device enables a lawmaking body to keep in closer touch with public opinion than otherwise would be possible.

**Legislative Privileges.**—In the development of lawmaking powers, certain privileges have become fun-

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<sup>5</sup> In the United States "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills" (Constitution, Art. I, Sec. 7).

<sup>6</sup> See pages 300-302.

damental in theory. A house must have the right to decide disputes in regard to its membership, such as contested elections. It may delegate the decision of such contests to the courts, as in Great Britain, but the final power must reside in the house. It must be able to punish its members for unseemly conduct, to coerce others to obey its lawful orders, and to maintain its dignity by punishment for contempt. Its members, even when going and coming, must be free from arrest except for serious crimes; they must be allowed freedom of debate without fear of future accountability, and their dignity as representatives must be fully secured. Each house must also have the right to make its own regulations and its rules of procedure.

These rules vary greatly in different bodies, but are always important. They provide for the initiation and the reading of bills, discussions, amendments, and passage, carefully specifying each step with the purpose of allowing no bill to pass until each member of the house has full knowledge of its contents and an opportunity to express an opinion for or against the bill. To this end bills are read several times, debated either before a special committee or the committee of the whole, or in the presence of the house, thrown open to amendment, and when finally submitted for passage each member must be allowed full freedom in voting. If comparatively few bills are presented in a session, procedure is simple. As, however, the number of bills increases with democracy and growth in national importance, pressure for time compels modification in the system. This may be (*a*) in the form of restrictions on debate by limitations on the time allowed for it, and by the use of the *closure* or the *previous question*, or (*b*) by making a distinction be-

tween bills which affect the public as a whole and those which relate to private persons, localities, and details of administration. This distinction is best made by the British Parliament. Historically, legislatures have handled all kinds of bills and passed them by the same kind of procedure. The result is that the larger part of legislative activity may be spent on what is really administration, this being especially true of American law-making bodies.

**Administrative Aspect of Legislation.**—Lawmaking bodies, through their control over finances, have to spend much time in devising effective ways and means of raising and expending moneys and in the efficient supervision of expenditures. British-American systems, through their fondness for working out the details of legislation, pass numerous laws designed to suit particular cases or special emergencies; matters which are usually left in other states to the ordinance power of the executive or to some department of administration. Such bodies, therefore, besides having real legislative functions in the formulation of policy through law, also exercise a vast ordinance or administrative power which is liable to be used in a perfunctory or inefficient manner. By far the larger part of the unpopularity of modern legislatures is due to the evils arising from this confusion of legislative and administrative functions. In the British Parliament the pressure of business has compelled a different procedure for private or local bills so that the time of the whole house need not be wasted. Such bills may be referred to committees, whose decision will be accepted as a matter of course; or classes of private bills may be assigned to an administrative or judicial body for settlement in accordance with some principle

laid down by the legislature. Such a distinction is important because the number of private bills introduced is always large, usually more in number than public bills, and public interests have to be neglected when so much attention is given to matters of small public importance.<sup>7</sup>

**The Committee System.**—When legislative business becomes too large entirely to be handled by the houses even with the above modifications, then a committee system is inevitable. It may (*a*) take a form like that of the British cabinet, which is practically a committee for the formulation of policy, or in its legislative aspect for the preparation of important bills and advocacy of them before the Houses. Or (*b*), as in the French system, committees may be appointed by the law-making bodies to consider, modify, and report on Ministerial bills and such others as may be referred to them,<sup>8</sup> or (*c*), lacking a cabinet system for the initiation of bills, as in the United States of America, all bills may be referred to standing committees of the respective Houses, which are authorized to investigate them thoroughly and to make recommendations.

This committee system has become so important in the United States of America that it has almost usurped the deliberative function of the lawmaking bodies. All bills when entered in the houses are promptly referred to committees, which derive their importance from the nature of the business intrusted to them. Most of these bills are pigeonholed and are never reported, a few may be reported adversely or without recommendation, and others, after investigation, public hearings, amendments,

<sup>7</sup> See the author's *Growth of American State Constitutions*, p. 224.

<sup>8</sup> See Lowell, *Governments and Parties in Continental Europe*, vol. i, pp. 111-117.

and perhaps complete revisions in committee, are reported favorably. The pressure of time is usually so great that debate seldom arises over the reports except when the subject is of great importance and involves political interests. A bill having passed one House has then to pass through practically the same procedure in the other House. Committees are so arranged that the dominant party controls the results of their decisions. The chairmen of the chief committees are also leaders of that party, each set in its own House, and form a sort of inner circle, not unlike the English Cabinet, for formulation of policy. Some one person is selected as head leader and placed either in the chair of the House with large powers, or in the chairmanship of one of the principal committees and authorized to guide the party on the floor of the House. The committee system is open to many objections, based chiefly on its secrecy of procedure and its practical usurpation of legislative functions, yet it is plainly useful and under present conditions necessary. Time may remedy its defects or substitute in part a system that may insure greater responsibility and susceptibility to public opinion.

**The Veto Power.**—The passage of bills by a legislature does not always imply that such bills at once become laws. There are usually general or special provisions specifying at what times the bills shall take effect. In addition to this almost all states place in the executive's hands the veto power. This may be absolute or suspensive. In the first case an executive's veto kills the bill and the labor of the legislature has been in vain. In the second case the bill is sent back for reconsideration. If on reconsideration the bill again passes, no further veto is interposed. The absolute veto is used only in

monarchical systems. The use of the English cabinet system virtually makes this veto obsolete, for all bills submitted to the King for signature have been approved by his Cabinet, and under such circumstances the King would not venture to oppose the combined wishes of his Cabinet and lawmaking body. In some states, also, before bills are finally passed, they must be submitted to the electorate for approval or rejection. This form of veto, known as the referendum, is found only in countries where democratic influences are powerful.

**Legislative Powers in Determining Policy.**—When the English House of Commons began to exert its powers, it was almost entirely under the control of the Executive, who sent his Ministers into the House and tried to dictate or influence its decisions. This was the reason why the House fought so vigorously to control the appointment of the King's Ministers. When this had been accomplished, the House was thereby able to dictate to the King his policy. It is inconceivable that a wise king would refuse to accept the advice of a ministry who represented the will of a dominant parliament. There are, therefore, two great monarchical systems for the formulation of legislative policy: (*a*) the will of an autocratic king expressed through his ministers, or (*b*) the will of a parliament expressed through a ministry forced on the king. The essence of the distinction is best obtained by noting whether the ministry is responsible to the king only, or to the parliament.

**Legislative Determination of Policy in the United States.**—In the United States of America, owing to the use of separated, coördinated departments, the English system was not feasible. How legislative policy should be formulated under such conditions was a problem. At

first the President, aided by prominent members of the Congress, dictated this policy, and this system might have become permanent had the President's views regularly harmonized with the opinions of Congress. This, however, was seldom true after 1824, and in consequence each House has developed a system of voicing its policy through a legislative caucus. The members of the dominant party in either House meet in private session, formulate a policy, and intrust the execution of it to their natural leaders, who, as chairmen of the principal committees, are able to control legislation. In the House these powers are centered in the Speaker and in the leader on the floor who, subject always to the approval of their party following, direct the machinery of the House toward the accomplishment of the policy outlined by the caucus. The system is practically the same in both Houses, except that in the Senate the chairmen of the principal committees unitedly guide the Senate's policy, as the presiding officer is by constitution the Vice-President of the United States of America and is not subject to the control of the Senate, and may happen to be a member of a party in opposition to the majority party of the Senate. In the American system, therefore, legislative policy is voiced through party caucuses under the guidance of their leaders, who act as chairmen of important committees and thus control legislation. As the President has the veto power, if he and the two Houses of legislation are not of the same political party, then important legislation is either not passed or is passed by a series of compromises after numerous joint conferences have been held.

A legislative body, therefore, in formulating its policy will either name the executive's council and work through

them, or will work through its own leaders and then seek to harmonize its policy as far as possible with that of the executive department. In the study of any state which has a legislative department, therefore, one should note carefully the respective powers of the two departments in the formulation of policy, and should see how harmony of purpose is attained. When the two departments are evenly balanced in power, conflicts for supremacy may arise, as in the struggle of President Wilson and the Senate over the ratification of the Peace Treaty. In Mexico the two departments are theoretically coördinate, but in reality the Executive dictates legislative policy. France uses the English cabinet system in form, but the legislative leaders of the Chamber of Deputies frequently dictate the policy to be followed by the Cabinet; but this is seldom possible in the British House of Commons.

**Powers of the Popular Assembly.**—In tribal communities, popular assemblies made up of warriors or freemen usually have merely the power of assent or dissent to proposals submitted by the smaller council of leaders. The large powers exerted by the popular assemblies of Athens and Rome are familiar to all students of the classics. When the English House of Commons began its existence in the thirteenth century its powers were extremely meager. It met simply to advise the King in regard to the amount of taxes its members would be willing to have assessed on their constituencies. But the commercial instinct of *quid pro quo* soon led these delegates to a series of bargainings, whereby each grant of money on their part resulted in the gain of privileges extorted from the King and the nobility. Each class naturally legislates for its own interests, and, during the régime of king and nobles, commoners had

secured only the crumbs. But on the other hand, as they came into power they secured for themselves more and greater concessions, until they won as their right supremacy in legislation and in governmental systems. In place of an autocratic monarch, the fountain of law and justice, surrounded by nobility and clergy as bulwarks of the throne, aiding him by advice, arms, and spiritual terrors, there has developed an autocratic assembly which allows the king to remain in office during good behavior, but reserves the privilege of beheading or removing him at will, and which forces him to accept as his cabinet its own leaders and to formulate a policy in governmental matters only after consultation with, and approval of, the cabinet.

It is evident that such a body, though nominally legislative, is more than that, for, through its leaders and by its lawmaking and constituent powers, it guides and controls the entire business of the state, executive and judicial as well as legislative. This rise of a popular assembly into power depends, as already explained, on the development of large commercial and manufacturing interests. The spirit of an autocratic monarchy seems to find its best expression in a state which relies chiefly on agriculture. The stability and uniformity of that life seem best to suit the conservative instincts of king and landed nobility. Commercialism tends to introduce a more flexible executive system; it weakens belief in the divine right of king and nobility and demands leaders in sympathy with commercialism and capable of readjusting the political system to the changing conditions of the age. This change may be brought about conservatively by depriving king and nobility of political power, but retaining them as social "survivals" or ornaments;

or, more radically, by substituting in their stead elective officials, who may be removed from office at stated times or whenever necessity requires.

**Power of the Lower House.**—So important a change as this is not easily accomplished, and seldom without revolution. The history of all commercial states, ancient or modern, illustrates the principle. In England the process began by attempts on the part of the House of Commons to compel the King either to accept Ministers named by it or to consent that Ministers named by him be responsible to the House. Bills of attainder and bills of impeachment were weapons used by the House in the attainment of its object. The Puritan Revolution and the Revolution of 1688 definitely fixed the principle and applied it to Kings as well as to Ministers. The rise and development of the premiership<sup>9</sup> in the eighteenth and nineteenth centuries worked out a system whereby the real work of government might be done by the House, while retaining the forms and appearance of an autocratic monarchy. The United States of America at the adoption of its Constitution went one step farther when it refused to establish kingship and nobility, and in their stead established an elective head assisted by ministers appointed or elected for definite terms, all subject to removal on impeachment by the lawmaking body. Naturally these same principles apply to the struggle for supremacy which generally arises between the two houses of legislation. In monarchies they represent distinct sets of interests, not always harmonious. Each desires to have the final voice in decisions, and victory ultimately goes to that one which represents more truly the broader interests of the nation. In democracies the two houses

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<sup>9</sup> This office was legally recognized in 1906.

tend to represent practically the same kinds of interests, and full coöperation is hindered only by natural rivalries based on beliefs as to the respective importance of the two houses.

**Functions of Legislative Bodies.**—The numerous functions of modern lawmaking bodies may be broadly classed under four heads, though there are many differences in detail and in the scope of powers exercised under each head.

1. They have the right to declare and to formulate the law of the land, removing what has become obsolete, making clear what is ambiguous, and supplying new laws to suit the changing conditions of social life. This flexibility introduced into law has enabled states to adapt themselves readily to altering conditions, a thing well-nigh impossible under ancient theories of fixed and unchanging law.

2. They have the right to decide on the amount of tax to be levied for governmental purposes, the goods or other property on which it should be levied and to control the levying and expenditure of such taxes by reserving the right to hold responsible and to instruct, or even to appoint, all important officers in charge of public funds. This "power over the purse" has been the most effective agency in enabling the lawmaking body to control the other departments of government.

3. Lawmaking bodies have slowly won or are winning the right to dictate the policy of the state in international affairs. This historic power of the executive is passing under the control of the legislative department, which leaves to the executive the form of power, but exercises the substance of it through its control over finance and over the ministry or cabinet of the executive. In this

usurpation of powers properly executive it may assist in the making of treaties, or declare war, or share in the appointment of diplomatic or military officers.

4. The lawmaking body in many other ways is now able to exert power not primarily legislative. It may exercise judicial functions in deciding cases of contested election, or in trying its own members or officers of the other departments of government. It may appoint, or assist in the appointment, of officials, regulate the army, navy, and civil service, appoint and supervise administrative commissions, and regulate more or less completely the policy and administration of the other departments of government.

These classes of functions show clearly the importance of lawmaking bodies in political development. Almost unknown in Western civilization down to the nineteenth century, except in England and her American colonies, they have suddenly pushed to the front as agencies for economic and democratic development, and have reached perhaps the acme of their powers. Their natural limitations are now becoming manifest, and at present they do not enjoy the confidence formerly placed in them. It remains to be seen whether by internal changes they will become more efficient and regain lost confidence, or be superseded by more trustworthy governmental agen-

<sup>10</sup> For example, by the constitutional convention in the making of fundamental law, and by the electorate through the use of the initiative and referendum.

## CHAPTER XVI

### THE DEVELOPMENT OF LAWSMAKING

**Immutable Character of Ancient Law.**—Laws in the beginnings of political life, it may be recalled, were not made at all in the modern sense; they grew out of longstanding habits of mind and well recognized customs. Naturally, in savage or nomadic life, to men whose memory of things seldom went back of two or three generations, many customs would seem even more ancient than they really were. When codes of laws were memorized and handed down by tradition, as so frequently was the case, or when the invention of the art of writing supplemented the memory of man, far greater fixity and conservatism were possible in both law and custom. Hence ancient political systems of the patriarchal type always assumed that the law of the land was permanent and immutable, like the “law of the Medes and Persians, which altereth not,”<sup>1</sup> or the ancient and long-standing customs of England, tracing back to a “time whereof the memory of man runneth not to the contrary.”<sup>2</sup> Founded on traditional custom as ancient law was, and in a static civilization, it seemed changeless and divine. Only impious hands would dare to alter sacred customs ordained and sanctioned by the gods.

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<sup>1</sup> Daniel VI, 8.

<sup>2</sup> See Blackstone's *Commentaries*, Introduction, Section 3.

**Processes of Change.**—Yet no set of customs is sufficient to meet the requirements of a changing civilization, and hence there has regularly been a sort of necessity for a periodic modification of the old and introduction of the new. There are several processes whereby such changes were accomplished.

I. *Change Through Conquest.*—A fundamental and prolific source of change arises from conquest. The history of civilization is one long series of conquests involving compulsory amalgamations of race and assimilations of customs. Every subjugation implies modification of custom since neither party can maintain its own customs intact. Some customs of the conquered are ruthlessly suppressed, others modified and others, again, slowly become assimilated through unconscious imitation. The fact that conquerors and conquered become subject to practically similar environmental conditions also tends to produce uniformity of custom, each unconsciously conforming somewhat to the other. Such processes are always going on in human experience, and numerous illustrations of it in modern times will readily suggest themselves.<sup>8</sup>

II. *Change Through Interpretation.*—Again, no matter how static a civilization may be, no generation has just the same environment as its predecessor, nor do its people interpret customs exactly as did their ancestors. Hence by a slow and gradual process changes creep into the law, unheeded and unknown except as comparisons can be made at intervals of several generations. This tendency may be supplemented by strained interpretations of ancient customs and by the aid of the legal fiction. Judges even in modern times in their anxiety to satisfy

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<sup>8</sup> The Balkan states furnish many illustrations of this process.

their sense of justice, will modify the meaning of the law on the assumption that the law intends to do right but happens at times to be somewhat unfortunate in its phraseology. This belief in the inherent justice of the law leads in all ages to the introduction of legal fictions, so marked in their influence in the development of Roman and English law. A *legal fiction* assumes a thing to be true in law which is plainly not true or is probably false. The end always must be justice, not injury, so as to satisfy the spirit of the law. Numerous illustrations of legal fiction still survive in modern legal systems, but its importance as a modifier of law has been superseded by legislation.<sup>4</sup>

III. *Change Through Commentators.*—Akin to interpretation is the influence exerted by learned commentators of the law. Every legal system, whether secular or religious, develops a body of learned men who devote themselves to a close philosophic study of the law. The judge seeks to apply a principle to a case, but the jurist seeks to ascertain the principle involved in the law, and to harmonize it with broad ethical principles. They may, of course, go too far in their search for principles and may find them on the point of a needle or in the crossing of a *t*, but such casuists do not exert a permanent influence. A jurist, however, who with reason and lucidity shows the inner meaning of law in its relation to a larger sphere of life, is always listened to with deference and his opinions gradually influence the reasoning of other jurists and judges. In this way the profound wisdom of eminent Roman and British-American commentators deeply influenced the development of their respective

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<sup>4</sup> See S. E. Baldwin, *Modern Political Institutions*, Chap. VIII, "The Decadence of the Legal Fiction."

systems, as their ideas became slowly assimilated to the legal knowledge of their times.

IV. *Change Through Codifications.*—Codifications of customs have proved to be a great source of innovation, and many of them have been important in the development of civilization. The oldest extant is that of Hammurabi,<sup>5</sup> dating back to 2285-2242 B.C. The codification of Hebraic custom contained in the Pentateuch is familiar to most of Christendom. The Orient has many codes, a knowledge of which is becoming increasingly common in Western civilization. The Twelve Tables of Roman law and the codification of Justinian mark two great epochs in legal history. Teutonic and Celtic codifications are numerous and form important landmarks in early European history.<sup>6</sup> In more modern times the code of Napoleon and the imperial codes of Germany and Japan are typical in character and importance.

Codifications usually arise because of the conflict of rival interests and resultant compromises. In the process of subjugation the conflicting customs of conquerors and conquered may result in a codification of customs in order that each may know the other's law and this may result in a compromise formulating a statement of what law shall be enforced in the whole community. Class struggle or revolution within a state may in a similar manner result in a compromise that may be formally expressed in a definite code, at times partaking almost of the nature of a treaty between warring parties, as, for

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<sup>5</sup> See R. F. Harper, editor, *The Code of Hammurabi*. A partial code on tablets discovered at Nippur, and dating back as far as 3000 B.C., has recently been translated, showing a high development of law even at that early date.

<sup>6</sup> See, for illustrations, Edward Jenks, *Law and Politics in the Middle Ages*.

instance, the Ten (Twelve) Tables of Rome and the Magna Charta (section 61). Codifications may also be due to important changes in the internal conditions of the community, such as the rise of a commercial civilization with urban interests, supplanting agriculture in importance, or to a scientific desire for a clearer statement of existing law, especially when it is complicated by a conflicting mass of interpretations due to the lapse of centuries. The invention, also, of the art of writing seemed to result in codifications of law as an aid to memory.

Codifications are important in the history of legislation because they are in effect real legislation. No codification can be an exact statement of all the customs at that time enforceable by the state. Some will be omitted from the written statement, changes may be made inadvertently or intentionally, and perhaps even important provisions added. In former times the fact that a thing was written gave sanctity to it in general estimation. A written code, therefore, becomes a sort of sacred law, not to be tampered with by profane hands, each word of which has a weighty meaning. Development, therefore, inevitably takes place through interpretation, aided by the legal fiction, and this process may go on for centuries. Roman law, for instance, at the height of its development was theoretically supposed to be identical with the law of the Twelve Tables, just as the English common law of to-day is supposed to be the same in theory as that formulated centuries ago in the Magna Charta and through the judicial decisions of the thirteenth century. The so-called "worship of the Constitution" in the United States of America presents the same phenomenon. It was made by the "Fathers" and should be

changed rarely if ever, in the opinion of many. This document has in form changed but slightly in the last hundred years, but its makers would have difficulty in understanding its modern meaning as reached through interpretation. Similar illustrations might be made from the numerous creeds that regularly develop from varying interpretations of inspired writings. In other words, the phraseology of the code becomes a reservoir of an infinity of meanings, and each generation selects from the storehouse such interpretations as suit the conditions and ideals of the times.

V. *Changes Through the Executive.*—In all these possibilities of change in existing law, the underlying assumption was that the law was the same, unchanging, inherently divine, and fundamental to civic welfare. But there developed in the executive a power that practically amounted to the formulation of new law. As head of the state, and the eyes and the brain of his people, the king was supposed to watch over the interests of the community and secure its welfare. In so doing he issued decrees, ordinances, or proclamations calling attention to the law, supplying its details, and making application of it to existing conditions. In this work he was, of course, aided by his council, which, by the wisdom and experience of its members, gained influence in governmental policy. The decisions of king and council plainly could not and would not always conform to the strict letter of the law. New conditions demand new theories, and under color of the old the king would decree the new. An entirely new condition would necessitate an entirely new law, itself divine in origin as emanating from a divinely appointed ruler. In this way executives gradually assumed the right to modify ancient customs and

make new law when demanded. This ordinance power of the executive is still important, being also the prolific source of administrative rules and regulations.

The same theory would apply to the assemblies of democratic city states. These were not supposed to alter the existing constitution, but in practice, in what we would call the exercise of police power, they sometimes initiated new legal principles, or passed ordinances some of which would themselves seem to be, before many years had elapsed, ancient and long-standing customs. In modern systems the royal council, as already explained, has developed into a legislative body whose acts when approved by the executive become law. But the ordinance power of the latter department still survives and is exercised in all states. In relative importance it yields to legislation, which it is supposed merely to supplement. If necessity, however, should demand, this ordinance power of the executive becomes of the utmost importance; in times of crisis, in the form of war power, police power, or prerogative, it may temporarily even supersede the ordinary law of the land. The Roman dictatorship furnishes a peculiar form of such temporary despotic power in the executive, and also illustrates the fact that legal irresponsibility during the crisis is regularly followed by accountability with the return of peace.

**Modern Legislation.**—Modern legislation is not the result of a system carefully planned in advance and put into operation by wise statesmen. Rather, it is an accidental growth and the result of numerous petty happenings of small consequence in themselves. When the English Crown in the thirteenth century summoned unwilling delegates from the shires and boroughs to meet him for the discussion of money grants, it was merely a

tactful device to obtain larger grants in a more expeditious manner. It was a small thing to give in return some slight favor petitioned for by the delegates. Yet in the course of years these petitions began to come with due regularity whenever the delegates met in session, and the requests were increasing in importance. Promises, however, were easily made when much-needed money was in sight and might conveniently be forgotten when the Parliament was no longer in session. It was a little more serious when royal promises had to be fulfilled *before* the grants were made, but it was hard to refuse under the circumstances. Yet a century or two of this sort of thing set precedents for later centuries, and it was natural enough that a body of delegates representing constituencies rapidly increasing in wealth, intelligence, and importance should enlarge from time to time the scope of their petitions. When the issue was fairly joined in the seventeenth century, and the Stuart Kings awoke to the fact that the House of Commons did not really believe in royal supremacy and divine right, matters had gone too far to be checked. The beheading of Charles I and the dethronement of James II taught the Crown that a petition of the House was a command, couched in respectful terms. In this humble way developed modern legislation, a most powerful and effective device for the abolition of the obsolete and the establishment of the new, as France learned at the end of the eighteenth century.

**The Making of New Law.**—Modern legislation does not profess to be a mere interpretation of the law, but boldly proclaims that it aims to formulate new law. The introduction of this method of lawmaking is the deathblow to enlargement of law by legal fiction,

interpretation, equity principles, or royal ordinance. Circumlocution becomes no longer necessary, for a parliament has but to pass a statute embodying needed changes and the thing is done. The older devices are of use only when legislation is impossible. In times of sudden crisis ordinance power comes to the front. With a written constitution almost impossible of amendment by legislation, as is the Constitution of the United States of America, interpretation must be relied on. But these devices rapidly pass into disuse as legislatures obtain control of lawmaking and meet frequently for the consideration of possible changes. To be sure, there are natural limitations to this apparent omnipotence of legislatures. After all, only those laws can be enforced which conform to the customs and practical ideals of social life. New law must suit conditions or it proves ineffective. An unscientific law may involve some alteration in the fundamentals of human nature and a statesman should hesitate long before he attempts that. Then, too, incompetency and corruption on the part of legislatures inevitably result in a lessening of their powers, and consequent increase in the powers of the other departments of government. Yet, after all is said, modern legislation is a most powerful addition to governmental machinery, and when rightly utilized can become productive of much good in the state.

**Scientific Legislation.**—These several tendencies in legislation point to a time when legislation will be far more scientific than it is at present. American lawmaking bodies formulate entirely too many laws for petty and routine matters which might more wisely be left to administrative bodies. Much hasty legislation could be vastly improved if legislators were more familiar with

the experiments and experiences of other lawmaking bodies. There is need for the more careful drafting of bills so as to eliminate the many inaccuracies and ambiguities so common in legislation. Bureaus for the study of comparative legislation, like the legislative reference bureau developed by Wisconsin and found now in most states, and expert commissions appointed for the careful revision of statutes are steps in this direction.

But really scientific legislation is as yet an ideal to be attained. The fault found with legislatures is chiefly due to their failure to satisfy the ideals aroused by the optimistic democracy of the eighteenth century. We all have to admit the truth of Spencer's denunciation of the "Sins of Legislators"<sup>7</sup> and of the perennial criticisms of American legislation. There is a vigorous demand that legislation be wiser, and that it emphasize permanent general interests through a knowledge of history and of the laws of human nature and social development. Jeremy Bentham (1748-1832) voiced this demand for the nineteenth century in his *Theory of Legislation*. It is likely that studies in social psychology will help to supply for the twentieth century a wiser basis for legislation.

**Basis for Scientific Legislation.**—Legislation of a prohibitory sort, like criminal law, should be understood to be characteristic of a low-grade civilization and should be avoided whenever possible. In essence it is a threat aimed at certain supposed evil tendencies in human nature. The doctrine of innate human depravity is not so popular as formerly, and the question arises whether threats of punishment are really efficacious in preventing

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<sup>7</sup> See *Man versus the State*. Also discussion of this topic in Ritchie, *Principles of State Interference*.

crime. Admitting that prohibition and threat are necessary under present conditions and will remain so for generations, yet it should be assumed that such laws relatively should decrease, not increase in number with advancing civilization.

Persons are more easily influenced to do right than intimidated from wrong and this becomes increasingly so with social progress. Preventive, probative, and reformative methods are wiser and cheaper in the long run than punitive. The great maker of criminals is not defective human nature so much as vicious home life, squalid poverty among the illiterate and the unskilled, the lack of hope for the future, and unwise legislation.<sup>8</sup> Legislators should study the principles of horticulture and stirpiculture as worked out in eugenics, and make applications of these to the development of racial stock.

There are immense possibilities of achievement, inherent in a national stock, unutilized or ruined through misdirection. The most shocking waste of national resources is the waste of human energy. Legislators should become constructive and through a study of human behavior and social control should develop a real educational system that would stimulate and direct human energy into socially advantageous directions. Inimical unsocial conditions should be so readjusted as to assist in the fostering of right habits and of a social patriotism founded on an appreciation of the uplifting environment supplied by the nation to its people. Evil tendencies will thereby atrophy from disuse. Self-respect, honor, reverence for law and virtue, and kindred attitudes of mind can be developed and relied on under

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<sup>8</sup> Note, for illustrations, Carnegie Foundation Report, 1919, by R. H. Smith, *Justice and the Poor*.

a right environment far more easily than motives based on fear and intimidation.

The principle of self-interest also can be appealed to in such a way as to foster respect for law, not disregard for it. Ideally law should be so wisely drawn that men prefer to obey rather than to disobey. The American draft laws of 1917 were so carefully explained and discussed in advance that practically all opposition ceased and the young men of the country, with very few exceptions, cheerfully enrolled their names for military service. The probation system of treatment for juveniles and first offenders, if carefully handled by trained, well-paid probation officers of good character, would cut crime rates one-half at least, and much more if economic and social conditions were favorable. In economic life the former coercive attitude of the employer has proven unprofitable and far better results are obtained when both sides meet face to face and discuss differences with a mutual desire to get together. Arbitration, conciliation, joint agreements, the capacity to see the other man's point of view, these are signs pointing to a new attitude in economic life and point the way to a social theory of law.<sup>9</sup>

**Illustrations of Scientific Legislation.**—The beginnings of such legislation have already been made and illustrations are numerous. The necessity of raising taxes without too much friction has sharpened legislative ingenuity and developed such devices as the inheritance tax, the many forms of income and corporation taxes, the heavy indirect tax on the importations of luxu-

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\* Note carefully the Report to President Wilson made (1920) by the Interchurch Commission on the Steel Strike of 1919; a synopsis may be seen in the *Survey*, August 2, 1920.

ries, and the slight rebate sometimes made for the prompt payment of taxes, accompanied by an additional charge for failure to pay when due. If illegitimacy is common through the heavy expense of a formal religious marriage, as in Latin-America, the legalization of marriage through civil ceremony at nominal cost largely reduces the per cent, just as a wise divorce law proves to be a great aid in social morals. The American device of reducing the cost and difficulty of securing a patent stimulated enormously the latent capacity for invention. The reduction of the cost of postage is a well known instance of an aid to commercial and industrial expansion, and many governments stimulate local administrative efficiency by offering to pay part of the expense if a set standard is maintained.<sup>10</sup>

These and many other illustrations that might be suggested point to a trend in legislation when lawmaking will cease to be the crude social instrument it is at present and will become the great agency through which a nation will wisely direct the energy of its people for the up-building of national achievement. Plato said<sup>11</sup> that perfect government would come when wise men legislate or legislators become wise. An unintelligent democracy is like a rudderless ship, for scientific government above all things requires an intelligent public opinion; but this condition depends on the growth of general scientific knowledge, political intelligence, and civic patriotism.

**Legality of Legislation.**—When legislation has been passed by a lawmaking body and sanctioned by the

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<sup>10</sup> England, for example.

<sup>11</sup> "States will prosper when kings become philosophers, or philosophers kings."

executive, its provisions presumably must be observed throughout the state. But such legislation may be in violation of the letter and spirit of the constitution. Under such conditions a department of government or a citizen conceivably might refuse to enforce or to obey the law. Government would soon become a farce unless conflicting interpretations could be settled. The constitution may itself specify what department shall finally decide on the legality of a law; but, failing that, in autocratic monarchies whatever the king sanctions is the law and must be enforced and obeyed. In constitutional monarchies the will of the legislature, approved or even, perhaps, if disapproved by the king, is the deciding factor. In the United States of America, however, both the legislative and executive departments may agree as to the legality of a law and yet when it is brought before the courts as the law bearing on a case it may be decided to be unconstitutional and hence null and void. By custom the decision of a supreme court is generally accepted as final and is usually followed by the other two departments of government.<sup>12</sup> This enormous power placed in the hands of the American judiciary is justified only by the prominence of the judiciary in the British-American systems and the confidence felt in the impartiality of its decisions. The system is not imitated by other states, which prefer to rely on the final interpretations made by either the executive or the legislative departments.

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<sup>12</sup> The executive, however, has on several occasions ignored such decisions and enforced its own interpretation of the constitution. See, for discussion of this point, Willoughby, *The Supreme Court*, Chap. VII.

## CHAPTER XVII

### CLASSIFICATION OF LAW

**The Meaning of Law.**—If the state finds its origin in the war band, then the notion of law will be found in the command or order proceeding from the chief or chiefs in authority. A command by implication involves the notion of enforcement in some form or other, that is, it has a sanction. Furthermore, it is a command given to the group as a whole, a general or public command, having in view the welfare of the group. Lastly the members of the band or group recognize the utility of obedience to the command, realizing that safety is involved in harmonious action, under the leadership of those who admittedly are best able to decide on the policy that should be followed.

In the same fashion in the modern state there is a recognition of unity, of common interests and safety, and of the necessity of wise leaders authorized to voice the general will by enunciating commands having sanctions, commands that will be enforced, if needful, by the power and authority of the entire body politic. This power of command and enforcement is naturally best illustrated when the state performs its original function of warring in behalf of national safety. At such times unanimity of action is demanded and there is no time for lengthy discussions of individual rights or legal precedents. The command may be a demand for conscription

for military service, or the surrender of home and property, or the seizure of foods and clothing, but whatever it be, disobedience is followed by prompt and stern punishment under military, or *martial, law*, since the general safety requires the obedience of all.

**Social Customs.**—It will be recalled that in society as a whole there are many social governmental organizations having their own social authorities and their customary laws or rules, and that these ordinarily live their apparently independent lives under the protection of the state. In time of war these also come under the command of the state, forgoing their usual freedom and becoming subject to political law, as far as may be deemed necessary for public safety. In other words, the actual sphere of governmental activity enlarges considerably in times of national danger, resuming its normal field when once peace is fully restored.

**When Social Custom Becomes Law.**—Even in times of peace there is an approximation to this situation for there has been a steady encroachment of the state on the functions usually exercised by social agencies. With growth in civilization the function of the state passes beyond the mere preservation of life and property and broadens into the aim of general welfare. In doing so, however, it must trespass on or interfere, so to speak, with the jurisdiction of social authorities by taking charge of the customs and rules enforced by the superseded authorities and giving them henceforth the sanction of the state. Once a social custom ceases to be merely social and has behind it a political sanction it becomes law and in theory may be assumed to have been law from the beginning and from that time forth to be commanded by the state. Social customs in themselves are not law,

but whenever any such customs are adopted, as it were, by the state, they become because of that fact political and their enforcement becomes a matter of governmental obligation.

The theory of sovereignty implies, it will be remembered, that the state has supreme authority over the whole of society, but that in practice the government has limitations placed on it since there are many powers "reserved to the people." Yet as already explained, when the need arises, whether in war or peace, the sphere of governmental authority is extended, under the war power in time of war, or in times of peace by a broadening of the police power by interpretation, or by a change in the fundamental law authorizing the change. A recent illustration of this sort may be found in the prohibition of the manufacture and sale of liquors in the United States. Before 1917 persons might under regulation manufacture or sell liquors without legal condemnation, but in the midst of the War prohibition was ordered as a war measure and this was followed by the adoption of the Eighteenth Amendment to the national Constitution, whereby henceforth it became criminal to do what formerly had been permissible. This important change rudely shocks the minds of many who cannot readily see how a socially endorsed custom of long standing becomes over night a legally prohibited act. It is a vigorous instance, however, of a process of many centuries—the slow transference of social sanction to political authority, the intrusion of *law* over social custom, this making an added political function.

If this explanation be kept clearly in mind, one may be prepared to define law as command, even though many laws have an origin in social custom, and *law* may be de-

fined, therefore, as the will of the state, formulated in commands whether written or unwritten or in customs having a legal sanction, and enforced by the sovereign power of the state.

**Friction in Law.**—If all law were purely social custom, violations would be few and punishment rare. But customs may be artificial or forced and these complicate the situation by introducing friction and discord in attempts to enforce law.

1. Civilization, for example, has been marked by a constant series of wars and conquests. Conquerors and conquered settle down in the same community as rulers and ruled. Their differing customs clash and compel ultimate compromise, but meanwhile the dominant race enforces what seems to the conquered to be a harsh and arbitrary law, which they hate and violate whenever possible.

2. Again, the development of private property in land and personal forms of wealth, supplementing the earlier systems of communal ownership, multiplied enormously the possibilities of disobedience to law. Social philosophers have tended to decry private property as the root of all evil; Plato in his *Republic* and Sir Thomas More, in his *Utopia*, for instance, charge to its existence nearly all the evils of social life. It is certainly hard to find a sound ethical basis for the extremes of wealth—excessive riches and abject poverty. Many persons, therefore, have always found it easy to justify to themselves theft and robbery. This is as true to-day as it ever was. The largest part of criminal law is aimed at such crimes, and much social friction arises in consequence.

3. In the third place, society, through the institution of private property, has regularly tended to develop

classes, superior and inferior, governing and governed. The class in possession of governmental power naturally arranges the social and economic system chiefly to suit its own interests, and seeks to compel obedience to its mandates even by harsh measures if necessary. Class legislation, therefore, giving special privileges to a favored part of the community, is obnoxious to the others, who violate its injunctions without compunction whenever possible.

4. Lastly, legislation by lawmaking bodies has not always been wise and judicious. It may be too paternal, may interfere too much with personal comforts and rights, and may irritate by petty requirements and overofficialness so as to create a contempt for the law and a willingness to break it whenever convenient.

**Ignorance of the Law.**—To the governed, an aggravation of the legal system lay in the fact that for long periods a knowledge of the law and of its procedure was considered to be a privilege of the ruling class, who thereby were able to hold hidden terrors over their unwilling inferiors. The history of the Ten Tables of Roman law illustrates this point, since they were published so as to satisfy a rebellious spirit on the part of the masses of the people. The injustice of inflicting penalty on those ignorant of the law is obvious. Ignorance of the law should excuse no one provided the law may be known, but if ignorance is compulsory we feel that it should excuse. For this reason civilized communities have regularly demanded that enforceable law be proclaimed. The demand "That every man may know the law"<sup>1</sup> has been satisfied in most modern states,

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<sup>1</sup> Note, for example, the explanation in Edward Jenks, *Law and Politics in the Middle Ages*, pp. 10-11.

even though the complexity of law and legal procedure is such that few men can understand it when announced. A favorite dream of social Utopians has been that law be made so simple that even the unlearned man may understand.<sup>2</sup> That reform is still for the future.

**Older Forms of Law: Treason.**—The customs that first passed into law were probably those concerned with crime against the community as a whole, the beginnings of modern treason laws. A law against treason is primarily based on the notion of service owed to a community by its members, or on the allegiance due from a subject to a ruler. Law against treason in some form or other is found even in crude and primitive communities. Severe penalty was inflicted on those who failed in military service or obedience, or who conspired against the community or its head. As kingship developed, treason became personal. It was a crime against the head as the embodiment of the state. When kingship was hedged about with the notions of divinity, it became not simply traitorous but impious to lay hands on the "Lord's anointed," and spiritual as well as temporal punishment was meted out to the offender. Torture, confiscation of property, corruption of blood, and ecclesiastical censures were rigorously inflicted on malcontents. The idea of treason was extended so as to protect members of the king's family or his chief officers, and so as to include even words or criticism that might seem to imply hostility to the king and his government.<sup>3</sup>

In modern states, as autocracy and the divinity of

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<sup>2</sup> See, for illustrations, More's *Utopia*, p. 135 (Morley edition), and Gardiner, *Constitutional Documents of the Puritan Revolution*, p. 240, Section 6.

<sup>3</sup> See, for example, Feilden, *A Short Constitutional History of England*, pp. 3-7.

kingship become obsolete, treason consists in action against the state as well as against the king. Punishment of the latter class of offenses becomes more humane as kings lose their importance in the political system. In republics treason against the head of the state or his officers is rarely recognized as a special crime; offenses of that sort are treated under ordinary criminal law. Treason now is a crime only when directed against the state. Furthermore, as freedom of speech is essential to democracies, the tendency is to consider as treason only armed rebellion and not criticism of the government or its officials. These several varieties of treason laws can easily be illustrated by comparing the systems in states differing in political development, such as Japan, Germany, Great Britain, Switzerland, and the United States of America.

**The Law of the Land.**—It is obvious that in any society there will develop set and customary ways of carrying on social activities. Persons soon realize that time is saved and friction avoided by conforming their actions to social standards and routine. Such customs develop in all ages and in all kinds of social life, whether economic, domestic, or religious. They form a sort of unwritten code, enforced by parental and ecclesiastical authority or by the pressure of public opinion. Some of these customs, however, may become so important for general welfare that stronger pressure than social authority or opinion must be brought to bear on those members of the community who incline to acts in violation of social standards. Whenever a community in its collective capacity, presumably acting through its body of elders, its government, undertakes to apply such pressure, by fixing penalty for violation, then such customs

cease to be purely social and become political. In other words they become the *law of the land*. Customs thus sanctioned by the state, as shown by the decisions of courts, the acquiescence of the other branches of government, and the body of citizens, are virtually commands, ordering or prohibiting certain actions, and disobedience is followed by the infliction of a penalty fixed by the governing body of the community. As the sphere of governmental activity widens, other social customs become of general importance, enforceable under penalty by the state. Throughout the entire history of the state, laws have developed in this manner from customs, which are at first largely personal and local; some in process of time develop general importance, and when really essential, are enforced through government for the sake of the general welfare. It was in this fashion that England developed its *common law*, the rival of Roman law for world supremacy, the unwritten law of England, deriving its binding force from immemorial usage, as ascertained and expressed through the decisions of the common law courts.

**Roman Law.**—Roman law, it will be remembered, had been built up on the basis of the Twelve Tables, by edict of *prætor*, the commentaries of learned jurists, and the decrees of emperors, until when codified by Justinian it became the great code of the civil law, even yet the foundation and inspiration of European Continental codes, supplying to all systems of law many legal principles of permanent value. The term *civil law* is used in general as applied to Roman law, along with the modifications of it made by the various states that have based their legal systems on the principles of Roman law. The term, however, is often applied, in the United States, to

that part of municipal or internal law which is not criminal law.

**Equity Law.**—In the development of British-American law an important distinction has arisen between common and equity law. A decision based on custom may prove to be in itself unjust. A moral or just custom of one age may prove to be the reverse a few generations later. If a state aims to secure justice, it may rectify unjust decisions by authorizing some person, as the king, to correct the error in a particular case. This is the basis of the pardoning power of the executive, who by its exercise may temper justice with mercy, or at any rate with expediency. A special form of this power developed in England when the King authorized the Lord Chancellor, who in those days was regularly an ecclesiastic and the King's spiritual adviser, to soften the rigors and to amend the defects of the common law by the introduction of equitable principles. These he derived from his knowledge of Roman and canon law and classic philosophy. From these there developed a system of equity law, which for centuries flourished side by side with the common or customary law of the land. As the decisions or orders of equity courts are in effect orders of the king or executive, they are technically known as decrees, not as decisions. These two systems of law, with their separate courts and procedure, are slowly amalgamating, and in certain of the commonwealths of the United States of America have been merged into one definite system.

**Criminal Law.**—Acts of violence and theft, as already explained,<sup>4</sup> were long considered to be private matters, of no concern to the state, and were settled in

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<sup>4</sup> See Chapter VI.

accordance with the social customs of the community. Regulation, therefore, was social, domestic, religious, but not political. As the state began to enlarge its importance and to regulate all disputes that tended to disturb the peace of the community, necessarily it had to adopt a system of law as the basal principles for decisions. The customs of the community based on primitive customs and prohibitions (the tabu) supplied such a system subject to such modifications as from time to time became necessary. In this way developed ordinary *criminal law*, which names the various prohibitions enforced by the state, and specifies the penalties to be inflicted in case of violation of the law.

**Civil Law.**—In the same manner developed rules and regulations in regard to property rights. When property became private, not communal, regulation of rights became increasingly important. Disputes in regard to ownership often led to violence, and in its function as the guarantor of peace, the state had to assume an increasingly larger share in the settlement of disputes in regard to property rights. This jurisdiction, however, is not so marked as that exercised in criminal matters. In the event of crime the state assumes charge of the matter and treats the offense as one committed against the entire community. The state prosecutes, not the injured person, and the state bears the expense of investigation and inflicts the penalty. A *civil case*, on the other hand, is in form private. It is a dispute between individuals, who voluntarily bring their contention before a civil court as an umpire, seeking rights and remedies. The court decides in accordance with well established law and enforces its decision at the expense of the parties concerned.

**Social Customs that Became Law.**—Among social customs that in due time became political five may be mentioned as illustrations.

1. *The Law Merchant.*—The law merchant, or modern commercial law, a system of rules regulating trade and commerce, and enlarged by judicial interpretation and legislative enactment.

2. *Maritime Law.*—Maritime law, formerly a branch of the law merchant, regulating shipping, seamen, and navigation, and now included generally under admiralty jurisdiction, which deals with cases, civil and criminal, that arise in connection with commerce on the high seas and prize cases in time of war. Obviously, customs arising on land could hardly apply to such matters, and a system of law has been developed from principles of ancient maritime codes, Roman law, and analogies derived from common law.

3. *Canon Law.*—When the church played an important part in political life, and had jurisdiction over many matters now exercised by the state, it evolved from custom certain rules and principles that became the basis of an ecclesiastical law. Such law is still politically important in those states closely identified with the church. The Christian church in its connection with the Roman empire worked out, largely from Roman law, *canon law*, regulating ecclesiastical polity and activity. The influence of this law is still felt in such functions as have passed from ecclesiastical to political control, as, for instance, marriage, divorce, and relationships. Canon law itself has at the present time small political importance.

4. *International Law.*—In one sense the whole world may be considered as a sort of society in which the states as individuals are supposed to live in social rela-

tions and to develop customs. Unfortunately states in their intercourse one with another have too often lived in a condition of continuous war, the only peace being that which follows devastation and conquest. But civilized states prefer peace, and in the pursuit of it have developed a system of rules and regulations known as *international law*.<sup>5</sup> This is not law in the sense that it is enforceable by the state except in so far as any given state adopts certain principles of it as domestic law.<sup>6</sup> It is a collection of customs, ethical standards, and rules agreed on by general consent. Its chief principles are founded on the practices of great states, and enforcement depends on the pressure of opinion and the fear of war in case of violation. Its modern development dates from the time of Grotius (1583-1645), who, in his *De Jure Belli ac Pacis*, set forth its principles, derived from analogies in Roman and natural law, and from the practices of nations.

5. *Natural Law*.—The term *natural law* is still more remote from the notion of law as command of the state. It is a term common in ancient and mediæval philosophies and ethics emphasizing ideal teachings in respect to human relationships and considered as established by the gods, or thought out by wise men. These ideals embody basal principles of eternal right and justice, and unitedly make a sort of universal code towards the perfection of which all human codes were in duty bound to approximate. These ideals, of course, are custom in the sense that they were supposed to be the prin-

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<sup>5</sup> The contrasting term to international law is *municipal, internal, or positive law*, which is the law of the land, enforced by sovereign authority and determining all questions of public or private right arising within the jurisdiction of any given state.

<sup>6</sup> See page 72.

ciples of conduct observed by the gods and by some also were supposed to have been actually in practice among men in the so-called state of nature or golden age of man, before evil and discord became known.

**The Decree or Ordinance.**—In considering law as command it will be remembered that such law naturally emanates from the executive, and in due time passes to a legislative body as the specialized maker of laws. The several aspects of law considered as common and will briefly be explained.

An important historic form of law is the edict, or decree, and the ordinance. These are supplementary to the law of the land and are formulated through the executive and the departments of administration. If in a state there is no lawmaking body, the power of the executive to issue edicts, decrees, or ordinances is most important, supplying as it does the place of the legislature. The edict or decree is a command issued by the supreme authority, that is, the king or emperor.

The ordinance properly is a rule or regulation laid down for the guidance of the several branches of administration. The chief aspect of this is the law regulating those who serve in the army and navy. It is a form of administrative law and applies ordinarily to those only who are actively engaged in military and naval service. Yet in times of war or insurrection, the provisions of the civil law may be suspended as far as is necessary, and the more expeditious rules of the war organization employed so as to secure the peace and safety of the state. The method by which this may be done is set forth in the ordinary law.

The state, besides employing the services of those in the army and navy, has many persons engaged in the

ordinary administration of governmental affairs. These unitedly make up the civil service, as distinguished from the military and naval service. The rules and regulations governing the organization and powers of the civil service form the administrative law. This division of law is not highly developed in British-American systems, but has attained a much higher development in the states of Continental Europe.<sup>7</sup> In France, for instance, where this law has reached its fullest development, there is a special series of administrative courts, independent of the civil courts, having jurisdiction broadly of all cases involving acts of officials of the civil service, and cases arising under administrative law. The argument in favor of such a system is that it insures a more scientific, expeditious, and impartial decision than would result if the case were intrusted to the ordinary courts. In the British-American system there are special courts for the consideration of administrative disputes, but their decisions are subject to revision by the civil courts, which also have jurisdiction over civil officers.

**Legislative Ordinances.**—Another aspect of the ordinance arises in connection with legislative lawmaking. In statutory legislation no law can fully cover all possible details, and hence there regularly rests in the administration the power to make supplementary rules and regulations for the guidance of the several administrative departments. These rules are readily changed or modified to suit conditions. They are the *by-laws* of social organizations. The ordinance power of administrative departments is always large, but is especially

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<sup>7</sup> For a thorough comparative study of administrative systems in Europe, see Goodnow, *Comparative Administrative Law*, vol. i. *Organization*, and vol. ii, *Legal Relations*, and see pages 201-213 of this book.

emphasized in states not of the British-American type. Legislation in those countries is expressed in a concise and terse manner, and its details are left to be worked out by the administration under the guidance of the executive. This naturally enlarges greatly the importance of administrative departments. In British-American countries, on the other hand, legislation is detailed and verbose to the last degree, in that the legislature seeks to anticipate every possible emergency. The ordinance power of the administration is correspondingly reduced. City councils, being practically administrative bodies, issue their decisions under the name of ordinances, and since cities are known as municipalities, these ordinances are frequently referred to as *municipal ordinances*.

**The Statute and the Constitution.**—The rise of a separate body for legislative purposes in governmental systems results in a form of law known as the statute or the act. Naturally the rise of the parliamentary or legislative statute proportionately lessens the necessity for executive legislation and is supposedly a step in the direction of democracy. The statute is presumed always to harmonize with the fundamental, or constitutional, law, applying its principles to the changing conditions of political life. In federations there will be a dual series of statutes or acts: those of the national lawmaking body and those of the several commonwealths of the federated state.

In a previous chapter (IX) attention was called to the fact that every state has a body of fundamental law, written or unwritten, known as its constitution, and this term was defined and explained. Utopian constitutions may be worked out by social philosophers as ideals in

political development. In Greek classic times philosophers not infrequently undertook to write out on request, model constitutions for particular states; and Aristotle, in preparation for his famous work on *Politics* gathered together, it is said, the constitutions of some two hundred states. In other words, he had prepared for him a statement of the fundamentals of the governmental systems of these numerous, but for the most part petty, city states. Similarly the constitution of any state can be studied and set forth by any competent person familiar with the political system of the state in question.

The written constitution is a really important development of modern times, since like statutory legislation it seems to be made *de novo*. Many of its provisions will, in fact, be based on the fundamental customs of former generations, but the essential point is that a special body, a constituent assembly<sup>8</sup> or a constitutional convention, devotes itself formally to the formulation of a law which is to determine governmental organization and powers in future years. It is the high-water mark of legislation and a great achievement from the standpoint of national progress.

The introduction of the written constitution has, however, created a sort of confusion in law. This formal document theoretically contains such fundamentals only as should be found in constitutions. In fact, however, for reasons unnecessary to explain here, written constitutions seldom if ever contain all the fundamentals, and may embody many matters of minor importance. In the United States of America, for instance, the national writ-

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<sup>8</sup> This term properly should be applied to a parliament or ordinary lawmaking body, when engaged in the formulation of a constitution, i.e., when it is acting as a constitutional convention.

ten Constitution would give an intelligent foreigner a somewhat vague comprehension of our constitutional system. He would need to supplement his knowledge by such information as is contained in Bryce<sup>9</sup> and in some treatise on the constitutional law of the land. On the other hand, if he desired to understand the constitutional system of one of the commonwealths by a study of its written constitution, he would be overwhelmed by the mass of petty detail of local and temporary importance contained in most of these. Yet these written, formal documents, from the legal standpoint, must be treated as the fundamental law of the state, or commonwealth, with which no custom, ordinance, nor statute should conflict. In states, therefore, having written constitutions there is the possibility, and even the necessity, of two lines of constitutional study—namely, (a) the study of the written document as the technical, fundamental law, and (b) the study of the constitution as it really is, that is, made up partly from the written and partly from the unwritten fundamental law of the land. This complication, while unfortunate, is, after all, not serious in practice. Familiarity with the notion of a constitution enables one readily to add to the written document whatever is needed, subtracting from it at the same time whatever is petty and local in character.

**Public and Private Law.**—There is an important distinction between what is known as public and as private law. Whenever the interests of the state as such are involved, the law bearing on such interests is part of the public law. Whenever the interests at stake are primarily individual, the law is private law. International law, so far as it concerns the interests of states,

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<sup>9</sup> *The American Commonwealth.*

is public; but so far as it concerns the interests of individuals who happen to be subjects of different states, it is private. The law regulating the property rights of individuals is private; but criminal law is a branch of public law, as also are the branches of administrative and constitutional law. In other words, public law is that in which the state is itself directly and primarily concerned, while private law regulates the relations of individuals one to the other. A distinction is sometimes made between international law, which is, technically speaking, not law but custom, and that law which affects the internal interests of the state. This is often referred to as *municipal law*. Municipal public law and municipal private law are both the law of the land in that they are both sanctioned and enforced by the state. International public law, as already explained, is sanctioned and enforced only by international public opinion, guiding itself by the customs and precedents of states.

**The Code System.**—A common law system, such as that employed by English-speaking peoples, is based on custom as determined by precedent and judicial decision. Roman law in its development was also a common law system. The codification of Roman law under Justinian suggested to modern states the idea that the law of the land should be embodied in a definite code systematically arranged and formally written, as the final authority for judicial decisions. The respective merits of these two systems of law are still a matter of debate, one important distinction being that judicial decisions as precedents for interpretation are minimized in code systems, whereas the opposite is true of the common law system. The code system is in use throughout the civilized world except in British-American countries.

In some of the commonwealths of the United States of America there are approximations to the use of a code in (*a*) the consolidated statute, that is, the incorporation into one general enactment of all the statutes relating to a particular branch of the law, and (*b*) in the codification of particular branches of public, but rarely private, law.

tion of the community multiplied through the influx of aliens and merchants, the hereditary heads of the community would not adequately represent the differing interests of the growing city or city state and there came a clash of interests between landed rural wealth and the personal wealth of merchant leaders. Hence there arose a demand for representation, not of persons as in modern democracy, but of interests and localities. Such demands and their satisfaction are illustrated by the reform legislation of Solon in Athens and of Servius Tullius in Rome, both of whom arranged that wealth and occupation should have a share in governmental power. The culmination of this movement in classic times is best known through the struggle of the plebeians against the patricians in Rome, which finally resulted in the bestowal on every adult male *member* of the state the rights of citizenship and of a voice, however slight, in the affairs of government. This voice was expressed by formal vote cast on stated days.<sup>1</sup>

**Definition.**—When citizens, as such, meet in a formal way, and at a set time, and, in a definite place and manner, express their choice by vote for officials, or representatives, or for governmental measures, they form in effect an electorate, which term has been defined as that body of citizens legally authorized to participate in the exercise of some of the sovereign powers of the state. Feudalism and mediævalism minimized the necessity for this democratic device and what little voting took place was based on hereditary right and on wealth. The commercial centers of Italy and Germany revived in some

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<sup>1</sup> For an excellent brief study of these movements, see *The State*, by Woodrow Wilson, pp. 64-120. It should be remembered that aliens, freedmen, and slaves were not citizens even though born residents.

respects the city-state methods of classical days, ushering in what may be called commercial democracy; but with the fifteenth and sixteenth centuries the rising tide of democracy once again brought the notion of an electorate to the front. Its philosophic expression was in the famous social-contract theory which asserted that every man inherently was a sovereign and hence had a sort of natural right to voice his wish in government. In religion the same idea was expressed in the teaching that before God all men are equal and responsible, and in the eighteenth century its economic equivalent was voiced by Adam Smith in his stress on the individual right of free competition and freedom from governmental interference (*laissez-faire*).

**The Suffrage in England.**—In England a national electorate formally came into existence when county, or shire, courts and boroughs were authorized to send delegates who should assist the council in advising the King on matters of taxation. The Parliament of 1265, summoned by Simon de Montfort, was the first to include both of these sets of delegates, but the model Parliament of 1295 is considered as the first complete Parliament, henceforth a national assembly, no longer a feudal council. The suffrage in county court first took definite form in 1430 when the forty-shilling franchise was made the basis for voting and this held true with occasional variations for four hundred years.<sup>2</sup> Borough suffrage was a hopeless maze of varying systems, which grew more complicated with passing years, but on the whole was concentrated into the membership of the borough govern-

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<sup>2</sup>The forty-shilling franchise still survives in Rhode Island, translated into dollars, in its property qualification for suffrage in the election of city councils and in financial town meetings.

ment, which was vested in close monopolistic, municipal corporations electing their members coöptatively. The whole system by the beginning of the nineteenth century had become vicious in the extreme through corruption, it was utterly unrepresentative, and with an electorate estimated to be less than three per cent of the entire population.

**Modern Reforms.**—The definite reform movement began in 1830, resulting in a steady enlargement of the membership of the electorate, until by 1914 the suffrage, though curiously complex and undemocratic in its workings, had become almost manhood suffrage and was held by about one person in six, *i.e.*, nearly seventeen per cent of the population. This enlargement took place chiefly by removing disabilities based on racial and religious distinctions and by broadening the applications of a reduced property qualification to all classes of the population.

One important result of the Great War was the fraternalization arising from a common danger and service, and also a deep appreciation of women's services in sustaining the burden of war preparation, so that naturally enough Parliament showed its appreciation by passing the "Representation of the People Act" of 1918. This provided for adult suffrage by admitting males over twenty-one years of age (nineteen only if with war service), and women over thirty years, thus adding about two million males to the lists and about six million women, so that now about one person in three has the suffrage or nearly thirty-four per cent of the whole population. This larger age qualification for women is admittedly temporary, it is due to war conditions and presumably within a very few years will be made the same as that for men. Other reforms were added, such as the

redistribution of seats on the basis of one member for seventy thousand (omitting Ireland), by abolishing very largely the grievance of plural voting by limiting the maximum votes to two,<sup>3</sup> by having all elections on the same day, and by assuming the official expense of elections, thereby relieving the candidates of a large part of the expense of elections.

**In the United States and France.**—The American Colonies at the time of their Revolution also had a severely restricted suffrage, on the average about one person in thirty of the population having a vote at the time of the adoption of the national Constitution. Emphasizing, as the Americans did, the contract theory of human equality and having a virtual equality of economic conditions and opportunity, class distinctions based on property, religion, and social prestige little by little loosened their grip on special privileges and by 1870 the entire country with few exceptions had adopted manhood suffrage, including the enfranchised slaves. French Revolutionary democracy also favored manhood suffrage<sup>4</sup> and from these two revolutionary centers influences spread throughout the Americas and the states of western Europe, sapping the old class distinctions in matters of suffrage.

**Woman Suffrage.**—The movement towards suffrage for women began definitely about the middle of the nineteenth century and for over fifty years was chiefly a campaign of education. The rapid opening of the schools and of economic opportunity to women during the last fifty years finally put a new face on the matter

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<sup>3</sup>A residence domicile and a business location, or a university vote if a graduate.

<sup>4</sup>Under the Constitution of 1793, but permanently from the year 1852.

and the climax of the Great War and the important services rendered by women in the war gave the decision in favor of women's suffrage. Most of the states of Europe have adopted this reform and adult, or general, suffrage<sup>5</sup> will shortly prevail throughout the English-speaking world, and in practically the whole of Europe, including Russia. The states of Latin-America, the Romance nations of Europe, and Japan are least forward in movements towards adult suffrage, owing to racial conditions and traditions.

#### The Electorate as a Department of Government.—

It is important to note that wherever an electorate exists it becomes *ipso facto* as truly a part of the government as any other department exercising political powers. The powers which an electorate may exert vary considerably in extent in different states, but the tendency in democracies is to bestow increasingly larger powers, as citizens attain greater intelligence and political capacity. The powers usually assigned are executive. That is, the electorate may be authorized to appoint candidates to certain designated offices through forms of election. These offices may be (*a*) executive or administrative, as in the election of a president, a governor, a mayor, or the head of an administrative department; or (*b*) judicial, as in the case of judges elected by popular vote, the system prevailing in about three-fourths of the commonwealths of the United States of America; or (*c*) legislative, as in the election of representatives to lawmaking bodies. The new aspect in the election of lawmaking representatives is that the legislatures in modern times regularly voice the will of the population as such, and hence are more demo-

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<sup>5</sup> The term universal is often incorrectly used as applying to manhood, or to adult suffrage.

cratic than were the unrepresentative bodies of earlier centuries.

Occasionally the electorate is authorized to aid directly in legislation through the initiative and referendum. At times, also, the electorate secures the right to assist, through delegates chosen by lot, in judicial decisions by the performance of jury service, or in the indictment of persons charged with crime through the grand jury. These are direct powers and are important in proportion to their extent. If, for example, an electorate should have the power directly to appoint or to recall by election all important officers of the three historic departments of government, and should have a deciding voice in the formulation of the constitution, its power would be enormous. If, also, the electorate were composed of all adults in the nation, the people, expressing their will through the electorate, might well be said to be exercising full sovereign powers.

**Restrictions on Electorates.**—Electorates, however, rarely have so much power assigned to them by constitution and do not always include all capable adult persons, nor even adult males. Theories of social welfare may result in modifications of the principle of suffrage by introducing restrictions intended to discriminate in favor of the more intelligent and reputable classes. Such discriminations may be made by requiring a minimum standard of education or intelligence, by emphasis on economic capacity as shown by the possession of taxable property or the pursuit of an honorable occupation, or intellectual attainment as shown by the possession of a university degree, or, on the other hand, by disfranchisement of the pauperized and the criminal part of the population and by restrictions based on sex, religion, or serv-

ice in certain branches of governmental administration. In aristocracies or oligarchies there may be an electorate composed of a small class of nobles only, or of persons of wealth. In any so-called democracy it is always important to note (*a*) whether the restrictions on suffrage are severe or light and (*b*) how numerous and how important are the direct powers placed in the hands of the electorate. The restrictions may be so great and the power so slight that the system is really a close oligarchy, as is the case in practically all of the states in Latin America.

**Methods of Voting.**—The most ancient method for the formulation of a decision through suffrage is that known to-day as *viva voce*. A question is submitted to the assembled voters for their approval or rejection, and by word of mouth, show of hands, or other sign they signify their decision. Ancient familiar examples of this may be found in Hebraic history, the Homeric Ecclesia, and in the Germanic Assembly<sup>6</sup> of Tacitus. Modern examples are seen in the town meeting and in ordinary social organizations. The Athenians selected most of their officials by lot, selecting the candidates from the suffrage list made up of Athenians only, since resident aliens and freedmen were not citizens. The present usual form of suffrage is through the secret ballot. This device was regularly employed by the Athenians and the Romans, was revived in the period of the Renaissance, and is now in use in an improved form in practically all modern states. The English Ballot Act, superseding the ancient method of election, was not adopted until 1872. The improved method in use throughout the United

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\* “*Si displicuit sententia, fremitu aspernantur; sin placuit, fremeas concutiunt. Honoratissimum assensus genus est armis laudare.*”

States of America, popularly known as the Australian ballot system, was adopted in the last decade of the nineteenth century.

**The Ballot.**—There are many forms of ballot, or combinations of forms, in use and of these may be mentioned, for illustration, the circle form which permits of a straight party vote by inserting a cross in the center of the circle. This ballot, therefore, requires that the candidates of each party be arranged in a separate column under an appropriate heading. By contrast the several candidates for each office may be arranged under the title of that office, thereby compelling the voter to make a choice of the one he prefers by marking the cross opposite his name. This system favors independent voting. The "short ballot" reform (in the United States) advocates a larger use of appointment and other devices, so as to shorten the lengthy ballots in use by most commonwealths; these absurdly lengthy ballots<sup>7</sup> are so complex as to be beyond the comprehension of the average voter, who, therefore, is tempted to vote a "straight ticket" by marking the party circle as the easiest way out of the difficulty.

The wide differences in results accomplished by variations in the form of the ballot make clear the fact that the mere adoption of adult suffrage does not of itself mean democracy. In states of great population it becomes equally essential that there be provided an adequate mechanism through which the electorate may express their choice intelligently and accurately. Failing this, bossism and political corruption prevail and democ-

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<sup>7</sup> Ballots are sometimes several feet in length. A New York City ballot some twelve years ago had 835 names on it; 250 to 400 names are not uncommon.

racy becomes inefficient. The next really important problem, therefore, in the art of politics is to develop really scientific methods for the expression of the popular will.

**Democracy Through the Electorate.**—Underlying the great political movements of the centuries there is manifestly a steadily increasing demand for democracy, which for six hundred years expressed itself chiefly in representative forms of government, but in recent years seems to be not representative in type, but aiming rather toward a direct participation of the electorate in government. It is not at all likely that great states of large population would be able to develop effective government through a direct democracy but it is practically possible in states of small population, and a combination of both direct and representative forms seems to be inevitable for the larger states. This trend is best seen in the modern experimentation in respect to the initiative and referendum, and this matter will be studied by way of illustration.

**Policy Through the Executive.**—Historically speaking, the initiation of projects of policy belongs to the executive, who has the right not simply to suggest, but to order a policy. Naturally this power is shared with his council, and in practice may pass from him to it. With the rise of a lawmaking body a new problem presents itself in the query as to whether its members also shall be allowed the privilege of initiating law. The English solution was that the members of the newly organized Lower House of Parliament offered their suggestions in the form of an humble petition, but in the fifteenth century the petitions took the form of a bill or completed statute to be accepted or rejected by the

King as a whole.<sup>8</sup> In due time the King's Ministers became responsible to Parliament, thus combining into a joint committee of the executive and legislative departments the function of introducing all important bills, although private members in theory may also introduce such bills as they desire.

**Policy Through the Lawmaking Body.**—Another stage of development is noted in a modern system like that of the national Government of the United States of America. Under this system the President and his Cabinet, in the form of the President's message, suggest to the lawmaking body a policy of legislation, but the initiation of these suggestions, or of any other suggestions whatsoever, is optional with the membership of the Congress. Whatever policy, however, this body may adopt, as testified by the passing of bills, must be referred to the Executive for approval or disapproval, by his use of the veto power. The present English system, so frequently imitated in other states, lies halfway between this and the earlier system. The members of the King's Council, the Cabinet, are at the same time members of the lawmaking body, and are both legislative leaders and authorized royal advisers. As leaders they dominate the initiation of a policy to be passed as legislation, and as advisers they voice the King's will; so that, while bills are formally referred to him for approval, consent is given as a matter of course.

**Policy Through the Electorate.**—The next step in development is especially important and needs careful

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\* The preamble then adopted is still the one in use, namely, "Be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same."

consideration. With the growth of democracy there develops an electorate, and the question arises as to its relationship to the lawmaking body. If this is answered by authorizing the electorate to elect the members of the lawmaking body, then a system of representative government is established. Given such a representative system, the problem then arises as to the best methods of securing a true expression of the will of the electorate through its representatives. It will be impossible to trace in detail the many devices to this end, but the most important of these may at least be mentioned.

In the first place, devices in respect to elections develop one by one; a limit is placed to the term of parliament or to the duration of the term of office, and careful provisions are made for nominations, balloting, and the counting of votes, and, in general, by a supervision of the mechanism of party machinery. There may be devised, also, a system of minority or proportional representation so as to represent interests more truly and to save the minority from the tyranny of the majority. Then arises the question whether representatives may be instructed, and how, if any one should prove recreant to his trust, he may be deprived of his office and *recalled* to private life. Following closely comes the notion that lawmakers may be instructed by placing over them a fundamental law, formulated by a special body in close touch with the electorate, and containing essentially a policy for a generation at least. Again, the electorate may assert its right to suggest by petition, or to advise by public hearings, what in its opinion should be the policy of the state, and finally may assert its right to have laws referred to the voters for their approval or rejection, and may even authorize these to initiate a bill or a consti-

tutional amendment, and to have it referred to the law-making body or to the voters for approval or disapproval.

If such a development were supplemented by a similar growth of the representative character of the electorate, as voicing the wish and will of the people, by removing, for example, distinctions based on rank, property, or sex, a condition might easily be reached in which the electorate would be practically identified with the people, barring minors and incompetents, and would be legally exercising the fundamental powers of the state by its right to initiate and determine the policy of the state. Evidently, therefore, a state in working out its governmental system along democratic lines, has the option of seeking to build up either a truly representative system closely in touch with the popular will,<sup>9</sup> or of inclining more and more toward a direct democracy by the use of such devices as the initiative and the referendum.<sup>10</sup>

**Use of the Initiative and the Referendum in Switzerland.**—As this last alternative has found its best development in Switzerland and in the United States, a brief statement in regard to these experiments may well be given. Remembering that the early Swiss cantons were small, rural communities, clannish and conservative by disposition, it would seem natural enough that they should use the direct democratic system of the village, with its elders as a council.<sup>11</sup> But when admin-

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<sup>9</sup> See pages 333-336 for discussion respecting proportional representation.

<sup>10</sup> By *initiative* is meant the right of the electorate to propose bills and to demand that these be submitted to the voters for approval or rejection. By *referendum* is meant the right of the electorate to demand that legislation passed by a representative body, or bills initiated by the electorate be submitted to the voters for final approval or rejection.

<sup>11</sup> This is still true of the cantons of Uri, Glarus, and in the four half-cantons of Unter Walden and Appenzell.

istration grew in importance and complexity, there slowly developed a system whereby the initiation of a policy was delegated to suitable bodies, although subject to popular approval on reference. In this way the electorate checked or balanced the power delegated to its magistrates, following thereby the teaching of the Swiss Rousseau in his *Social Contract*. In federal affairs the Constitution of 1848 gave formal voice to this system, and its later amendments have made still more emphatic popular control over fundamental and statutory law. Under the present Constitution there is an optional referendum in respect to statutes passed by the Federal Assembly and a compulsory referendum in amendments or revisions of the Constitution. For constitutional purposes the initiative also is authorized but is sparingly used. In the larger cantons, or commonwealths, a unicameral assembly is used but this is checked by the legislative and veto powers reserved to the electorate. The Canton of St. Gall in 1831 was the first to adopt the modern form of referendum and the Canton of Vaud in 1845 was the first to adopt the initiative. At present every one of the cantons uses the compulsory referendum for constitutional amendments, and all except Friburg for legislation; and they all with the exception of Lucerne, Valais, and Friburg permit the electorate to initiate legislative and constitutional changes.

Opinions differ widely in respect to the utility of the system, even among the Swiss themselves. To some it means the rule of an unreflecting mob, moved by impulse and prejudice, and dominated by motives of immediate utility or expediency. Others argue for it as a great device for popular education on political questions, and seek to show that in result the voters seem to be at least con-

servative rather than radical, erring occasionally through ignorance, but on the whole manifesting an intuitive common-sense appreciation of questions submitted, if these are not too technical nor too detailed.

It seems obvious that the experiment is being tried under most favorable conditions. Switzerland is a neutralized state, its people are thrifty and intelligent, and are in close touch with modern civilization. Certainly neither the Federal Government nor the cantons show any disposition to repeal the system, and it is probable that with experience and deepening intelligence that state may yet devise a workable system of direct democracy coöperating with a well ordered, representative form of government.

**The Initiative and the Referendum in the United States.**—In the Federal Government of the United States neither the initiative nor the referendum is in use, though there are occasional movements looking toward the introduction of the referendum into the federal system. In the commonwealths the following classes of legislation find illustration:

1. In practically all of them the referendum is used in purely local matters, usually in the form of statutory authorization of local bodies politic to decide for themselves, whether or not some local bill, or a local application of some general statute, shall go into effect. In the same manner there is in many States a local initiative in use, usually in connection with the commission form of municipal government.

2. Again, in many instances a State constitution may authorize its legislature to refer to the voters of the State some particular kind of general legislation, such as, for example, a proposition to issue a bond series.

Such general referendums, to be constitutional, must be authorized by the State constitution.

3. Beginning in 1898 with South Dakota, about twenty States by constitution have authorized the use of the initiative and referendum in general State legislation. So far Oregon and California have made the most effective use of this device.

4. Starting with Massachusetts in 1779-1780, new or revised constitutions and amendments are now regularly referred to the electorate for approval or rejection. Delaware alone of all the States does not submit amendments, and some States, especially in the South, promulgate constitutions on the authority of the convention, according to the usual custom in our early national history. Since 1890, for example, five States<sup>12</sup> have, without the use of the referendum, adopted revised constitutions.

5. The most radical change of this sort was made by the adoption of the initiative in amendments to the constitution, started by Oregon in 1902, and taken up by Oklahoma, in its new constitution, 1907, and by Missouri in 1908; there are at present some fifteen States that authorize the initiative in constitutional amendments.

6. A legislature may authorize a referendum so as to obtain from the electorate advice as to whether or not a proposed bill, or a particular candidate, has popular approval. This is a form of instruction, but it is not legally binding on the legislature. Party primaries may use the same system so as to suggest suitable candidates for office.<sup>13</sup>

In this connection it may be noted that the purely local

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<sup>12</sup> Mississippi, South Carolina, Delaware, Louisiana, Virginia.

<sup>13</sup> Illinois, Texas, Oregon, and Massachusetts among others have made use of this form of referendum.

use of the initiative and referendum, especially the latter, the occasional use of the referendum in general legislation, and its use in the adoption, revision, or amendment of State constitutions are familiar, long tried, and well established methods of legislating with the aid of the electorate. The general use of the initiative and referendum in statutory legislation, and the use of the initiative in amendments to the constitution are new to the American system, obviously borrowed from Switzerland, and are rapidly gaining favor in popular estimation. Nearly half of the States are experimenting with these devices although most of these are west of the Mississippi, where a more radical type of democracy prevails than can be found farther east. The advisory referendum is new, and may develop into a legalized method of giving instructions to delegates or representatives.

Evidently no dogmatic statement in respect to the outcome of this tendency toward direct democracy can safely be made at present. The Western states, with fewer precedents and more democratic conditions, can experiment with new devices in governmental machinery, the very thought of which would shock the conservative East. If, however, these experiments prove useful, they will undoubtedly be taken up in improved forms by other commonwealths. In this way real improvements will slowly work into the governments of the several States and ultimately become the law of the land. It may be observed that, so far as the initiative and referendum are concerned, there seem to be no backward steps. Whenever the system is on trial, it seems to be gaining rather than losing ground.

## CHAPTER XIX

### CITIZENSHIP, RIGHTS AND OBLIGATIONS

#### CITIZENSHIP

**Citizens and Aliens.**—Resident within a state are regularly two classes of persons, *citizens* and *aliens*. The citizens of a state are those persons who are domiciled within the state and are fully subject to its sovereignty. Aliens are those persons resident in a state who owe allegiance to another state.

In general, it may be said that the rights and obligations of aliens are determined by the laws of the land in which they are resident, including in the term *laws* those treaty regulations made with other states fixing the status of their citizens. As a rule, civilized states grant to aliens full protection of life and property, conditioned on their obedience to the law of the land. They are seldom allowed political privileges, such as office-holding or suffrage,<sup>1</sup> and are regularly exempted from military service, but they may be required to pay the usual taxes assessed on property, or special taxes for the privilege of transacting business. Their admission into the state is a matter of treaty agreement and international custom. Every state has the right to bar out aliens from its shores for reasons satisfactory to itself.

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<sup>1</sup> Seven of the commonwealths of the United States allow suffrage to aliens who have declared their intention to become citizens. The tendency is to repeal such privileges.

**Native and Naturalized Citizens.**—In law there are two classes of citizens: (*a*) citizens by birth,<sup>2</sup> and (*b*) naturalized citizens who were born under foreign sovereignty but who renounced their allegiance to the state of their birth and became naturalized by complying with set requirements and taking the oath of allegiance. Corporations, or artificial persons, are sometimes called *quasi-citizens*. A corporation is an organization authorized by law to act as a single person for the purpose of transacting business or holding and transmitting property. The duration of its life is regulated by law and is usually specified in its charter; its rights and obligations are civil, not political.

Naturalized citizens are regularly granted the same status as native born citizens, but certain high offices may be withheld from them. Native born citizens only, for example, may aspire to the Presidency of the United States of America. No alien may claim naturalization as a right. It is a privilege which may be granted or refused to him by the land of his residence at its own discretion. As the allegiance of every person is owed to the land of his birth and parentage, he is responsible to it for obligations incurred up to the time of his naturalization, but there are exceptions to this and states usually regulate by treaty the relations which their naturalized citizens bear to the country of their former allegiance, if these should happen to travel or temporarily reside in their former domicile.

**Inequality in Citizenship.**—In democracies the theory is that all citizens are equal before the law, should equally enjoy the protection of the law, and should have the same rights and owe the same obligations. It must

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<sup>2</sup> See the term *nationals*, page 47.

not be inferred, however, that all, even native born citizens, are equal in rights. In practice, for obvious reasons, exceptions are regularly made in the case of persons under guardianship, such as immature children and persons of unsound mind. Historically speaking discriminations regularly have been made against women, who do not always enjoy so large civil and political privileges as men nor owe the same obligations. To-day, however, discriminations based on sex are rapidly being removed in the more advanced states. Again, intelligence is so essential a qualification in democracies that illiterate persons are sometimes denied political privileges. For a somewhat similar reason these privileges are sometimes refused to persons who do not possess a fixed minimum of taxable property, the assumption being that a man incapable of acquiring property lacks proper intelligence. Naturally, also, in all states full rights of citizenship are refused to persons convicted of crime and subject to punishment; aside from the loss of their freedom through imprisonment, they do not have, for example, the freedom of the mails since their correspondence is restricted and censored.

There are other distinctions in rights also such as those found, for illustration, in the United States. Citizens of the commonwealths have well defined constitutional rights as against the statutory rights of citizens of territories or the District of Columbia, or the nationals of dependent islands or of Indians living in tribal relations. Such statutory rights are often much inferior to those enjoyed by the citizens of the commonwealths; especially is this true of political rights; the citizens of the city of Washington, for instance, have no suffrage rights in national or even in local elections. Distinctions such

as these are based on expediency and have their proper justification.

In states having aristocratic or monarchical governments there are other discriminations based on class distinctions. Ignoring those arising from social and religious codes we find in such countries classes varying considerably in their respective rights and obligations. Among these may be mentioned (*a*) the governing classes, including royalty, nobility, and priesthood, and (*b*) the economic classes, including merchants and traders, artisans and mechanics, farmers and peasants, serfs and slaves. The extent of variation found in the sum of rights and obligations depends on local conditions in the states, and the system of each state must be studied separately.

### THE NOTION OF RIGHTS

**Ethical and Legal Rights.**—There is an important distinction to be made between ethical and legal rights. Philosophers in reflecting on human rights usually reach the conclusion that all men are entitled to such rights as will enable them to develop to their highest capacity. The American Declaration of Independence, for example, following the teachings of John Locke, asserts that “all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” In these days, also, men talk about the “right to work,” the “right to the land,” and the “right to a living wage.” Such rights are *natural rights* in the sense that they voice ethical and economic ideals toward which men may strive and which some day men may realize. But they are not

*legal rights* unless they are recognized by the law of the land and are secured to citizens through the courts or other governmental agencies. In a progressive state legal rights will approximate toward the "natural" or ethical rights claimed by idealists, but as legal rights, on the whole, represent the practice of the community, there will always be a distinction between them and the rights demanded in ethical systems, since the state usually voices the demands of its dominant elements and these are not necessarily idealistic. Rights, therefore, in the legal sense, are not inherent in the individual, but arise from and depend on the law of the land.

**Civil Rights.**—In the development of democracy the question of rights has played a most important part. Historically, since rights originate in society and not in the state, they are consequently moral in their nature; but as the state gains power and attains supremacy in social life, a person may legally claim before the law only such rights as the state is willing to grant and to maintain. An individual may have his ethical rights through social consent and sanction long before they are sanctioned by the state.<sup>8</sup> In well regulated democracies the state willingly guaranties to its citizens all rights necessary for individual and social development; but when government is tyrannical, many of these rights may be denied or ignored; in which case citizens, lacking the essentials for a manly and honorable existence, incline to become inert, cowardly, and base, and preferably should be called subjects rather than citizens. From the beginnings of history, therefore, there can be traced in all energetic com-

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<sup>8</sup> To the abolitionist in slavery times a black slave was "a man and a brother," though the law at the time assumed that he was property and without the rights of citizenship.

munities a demand on the part of the people that their rights be recognized by the government and guarantied to them by proper regulation and supervision.

**The Securing of Civil Rights.**—In primitive hordes and in tribal organizations all members of the community enjoyed, in theory, at least, equal rights and equal protection. Under patriarchal organizations distinctions in amount and quality developed along three lines: (*a*) the social subordination of women to men, (*b*) the introduction of slavery, and (*c*) social distinctions based on kinship, wealth, and intelligence. The culmination of this tendency in autocratic monarchies resulted in a system in which the monarch acknowledged no rights in his subjects save such as depended on his will and whim. In practice this despotic will was restricted by long standing customs, by social institutions, and by the necessity of securing the good will and support of the dominant part of the community, whether nobility, army, or ecclesiastical institution. The history of tyrannical despots shows, however, to what lengths such a king may go when dominated by evil passions.<sup>4</sup> Reactions against tyranny resulted in a counter movement, in which men, basing their arguments on long standing custom, principles of justice and divine sanction, and on special privileges, demanded a reorganization of government so as to secure to them by legal sanction their most cherished ethical rights. Political democracy is the outcome of this movement. Its development in any state can be traced by noting historically how one right after another is secured, guarantied, and made part of the unwritten or written constitution of the state, and how these privileges, at first the preroga-

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\* Machiavelli's *Prince* gives excellent illustrations of the tyrannical excesses of Italian princes in the fifteenth century.

tive of the few, gradually were won by the many and finally come to be looked on as the inherent right of all. These rights were not won by the people from their governments without many struggles, and European-American history marks by its revolutions those struggles which resulted in numerous historic guaranties of rights.

**The Fundamental Right.**—These rights are all derived from the one inherent fundamental right, the right to life. All other rights pale into insignificance in comparison with the right of every man to live out to the full the life imparted to him. Ethically speaking, every person who fulfills his social obligation should be allowed to enjoy the privileges of life under the guaranty of the state. This fundamental right differentiates into numerous individual rights, more or less carefully defined, secured, and guaranteed, according to the degree of development of intelligent democracy in political communities. Every citizen, for instance, should have his life safeguarded and secured from harm by the war, police, and judicial powers of the state. In order to feed his body he should be encouraged to engage freely in economic occupations, and should have the aid of the state in multiplying and strengthening his economic opportunities and in safeguarding his property. In order to perpetuate his race every normal citizen should be allowed the privilege of marriage and parenthood and be protected in his family rights. In order to develop to the utmost the higher part of his nature, he must be allowed the privileges of freedom of conscience and of worship, the privilege of thinking freely and expressing his thoughts openly, and he should be aided to attain such development by governmental encouragement of educa-

tion and a free press. Finally, in order that he may maintain his rights and the better fulfill his obligations, he should be given a voice in the government. Rights won by the energy and self-sacrifice of one generation may readily be lost by their descendants. Constant vigilance and civic patriotism are the only safeguards of liberty, and no governmental guaranty of rights can be effective unless made so by an active citizen body who stoutly defend and augment the work of their fathers.

**Civil Rights.**—Legal rights may be divided into two kinds, civil and political. Civil rights are concerned with the protection of life and property. Political rights enable their possessor to share in the exercise of governmental powers.

From the international standpoint all persons enjoying full citizenship are recognized by modern states as having the right of *expatriation*, that is, a citizen may voluntarily renounce or abandon his allegiance to the land of his birth, assuming that he has fully complied with all the obligations incumbent on him. He has, however, no legal right to demand citizenship in another state, unless that privilege is freely granted to him by that state or secured to him by treaty rights. On the other hand, a state may refuse its citizens the right to leave the country without permission, but as a rule such permission is freely granted except in time of war. A citizen when traveling in foreign countries may claim protection for life and property from his state, if these are violated by the state in which he is sojourning. Within the bounds of his state a citizen has the right to demand that his life and property be protected against foreign foes, against riot and insurrection, and against assault and robbery. Even if a citizen merely suspects that his life or property is

endangered, he has a right to demand that the state take proper precautions so as to safeguard him. Property must not be understood in the sense of material goods only, it includes intangible property, such as claims and rights arising from inheritance and contracts. He properly also may demand that the state take precautions against contagious diseases and that the conditions of life are hygienic and sanitary. He also may claim protection for his rights in family. The law should secure to him his share in inheritance, grant him under proper regulations freedom in contracting marriage and secure him in his marital and parental rights. The sanctity of his home should be guarded and severe punishment visited on a violation of chastity. This protection of life and property is afforded by the state through its war and police powers and the numerous governmental agencies associated with these. These agencies must be made efficient, for the proper protection of life and property is fundamental to the stability of any state. It inspires confidence, stimulates devotion to government and encourages industry and frugality.

**Broadening of Civil Rights.**—In modern times the influence of democracy is deeply affecting the policy of the state in respect to life and property. In addition to protection, emphasis is now placed on development. Life should be broadened and made happier, and opportunities should be furnished so as to allow larger possibilities in the acquisition of property. Hence citizens have the right to migrate freely, to acquire and hold property, to engage in any honorable occupation, to form business contracts with their fellows and to demand governmental advice and assistance in the general economic field. This aid the state may furnish through the building of roads,

bridges, canals, irrigating works, and systems of transportation. It may encourage commerce and manufactures by subsidies, tariffs, technical instruction, and efficient protection for the honest investments of its citizens in other lands. It may furnish facilities for business transactions through a postal service and through banks and a stable means of exchange; it may develop agriculture by scientific investigation and experiment. These functions which seem optional are really necessary, are demanded by citizens, and are practically extensions of rights, since citizens insist in their demands that the state promote "general welfare."

In the same way the right to life now involves the "pursuit of happiness." Happiness implies liberty of mind and freedom for mental development. In consequence, in most modern states, citizens are at liberty to think freely and may express their thoughts openly, in conversation, in print, or on the public platform. They may assemble freely in public or in private, and have the right to petition the government on any subject whatsoever. In matters of religion they may follow their consciences without interference from the state and may organize whatever agencies they wish for intellectual improvement. Even the demand for general and broad education is essentially a right at the present time, since no modern state can hope to make progress if it denies the right of its citizens to secure a liberal education.

**Famous Guaranties of Rights.**—Many of these rights are historic, tracing back to ancestral customs and to codifications of these, such as that contained in the Magna Charta of 1215; or the "Golden Bull" of Hungary (1222), its charter of national liberty; or the "Great Privilege" won from the Burgundians by the

Netherlands in 1477. Others represent later struggles for political liberty, such as the several English bills of rights of the seventeenth century and the famous statements of rights that came in the eighteenth century through the Revolutions in the American Colonies and in France, and were formulated in the Declaration of Independence, in the bills of rights contained in the Revolutionary constitutions of Virginia, Massachusetts, and Pennsylvania, and in the French Declaration of the Rights of Man, issued by the National Assembly in 1789.<sup>5</sup> The best short summary, though not complete, of well recognized legal rights is contained in the amendments to the Constitution of the United States of America. The joint influence of these several centers of democratic agitation is plainly shown in the fundamental laws of Latin America.<sup>6</sup>

**Regulation of Rights.**—In practice, the exercise of rights is subject to reasonable regulation. A citizen may speak freely, but he must not slander nor libel his fellows; he may criticize governmental policy, but he must not incite to violence; he may worship God as he pleases, provided he is not immoral in his religious practices; he may engage in any business he pleases, provided it is not unlawful; he may enter any profession, provided he has the requisite skill; he may marry whom he wishes, provided he is a fit person to marry and the woman gives consent. Such regulations are often specified in the laws; in other cases they are worked out by the courts, which act on the principle that the law allows to every

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<sup>5</sup> See Jellinek, *Declaration of the Rights of Man and of Citizens*.

<sup>6</sup> For illustration of this, see article by the author on "The Spanish Source of the Mexican Constitution of 1824," *Texas State Historical Quarterly*, January, 1900.

citizen the utmost freedom consistent with the rights of others and the general welfare.

In times of war personal rights may have to yield to the larger right of life of the unified community. The state in defense of its life may find it necessary to place large restrictions on, or even to deny *in toto* the rights of its citizens. Obligations, not rights, are emphasized in war. Yet the invasion of personal rights should be guarded against as much as possible, reserving decisions to the courts if feasible rather than to officials, in respect to the necessity of suspending the guaranties of rights.

**Basis of Political Rights.**—Legal rights, as already said, are based on the law of the land and secured through governmental agencies. But if the citizen body as a whole has no voice in the making of laws, and if the government is controlled by a comparatively small per cent of the citizens, there would be no real assurance that general rights of life and property would be safeguarded. Experience shows that a small class in control of the law and its administration too easily inclines to neglect general interests, especially when these are in conflict with its own private interests. For such reasons there have regularly arisen demands for the governmental sanctioning of such political principles as these:

1. That office be considered a public trust not a private right, and that it be administered by responsible persons, who may be called to account for violations of law.
2. That the judicial system be administered impartially, so as to secure to all citizens their rights.
3. That the law be definite, and open to the knowledge of all.
4. That the citizen body have a determining voice in

the making of law, either directly or through representatives.

5. That the electorate or body of voters include the largest possible per cent of citizens of recognized maturity and intelligence.

**The Winning of Political Rights.**—These demands are now generally acknowledged in democracies and in consequence a large proportion of the citizen body have the political right of suffrage. This power has been wielded so effectively that other political rights have been secured one by one so that electorates are steadily adding to their powers.

In addition to the right of suffrage, there is:

1. The right of every voter to aspire to any office in the state.

2. The right of the electorate to fill offices through election or through elected representatives, and the right to hold all officials responsible for inefficiency and misconduct in office.

3. The right to assist in the settlement of judicial cases by jury service; this is chiefly true in English-speaking countries.

4. The right to discuss freely and to criticize openly in speech, on the platform, or through the press, governmental measures, policies, and officials.

5. The right to determine directly or through representatives the fundamental law of the land, whether expressed in a written or unwritten constitution.

**How Rights Are Maintained.**—In these rights the essential point is that the citizens themselves directly participate in the exercise of governmental functions, or name from their ranks those who shall perform these activities in the name and for the welfare of the people.

President Lincoln ably voiced the democratic ideal in his famous Gettysburg speech, in expressing his determination that "government of the people, by the people, and for the people shall not perish from the earth." Naturally, the complete attainment of this ideal is possible only in high civilization, but all modern nations tend to enlarge more and more the political rights of their citizens.

These rights have sometimes been attained in advance of a general capacity to use them wisely, with the result that inefficiency and corruption become common. Experience, however, which is always the best teacher, brings home the lesson of misgovernment in heavy taxation, excessive death rates, and economic disorders. Democracies, therefore, tend to emphasize at the present time character and intelligence as prerequisites for suffrage; with the proviso, however, that the state furnish free general education and further morality, so as to develop its citizens into persons capable of an intelligent exercise of the suffrage. Yet it should never be assumed that suffrage is an inherent right belonging to every citizen. The state properly may refuse the suffrage to evil, careless, or incompetent citizens who misuse or fail to use the vote confided to them. A general education in social and civic rights and obligations and an efficient system of schools are the safest guaranties of a democratic suffrage. Lacking these, a more aristocratic form is preferable until political intelligence becomes common.

#### THE OBLIGATIONS OF CITIZENSHIP

**Allegiance.**—The fundamental duty of all citizens is obedience, allegiance, and fidelity to the state. The

state voices the unity, the will, the collective interests of the entire community. Its commands, therefore, must be obeyed; its interests are superior to private interests, and, in general, no ties should be considered more binding than those that bind citizens to their country. This, however, does not mean that a citizen owes passive obedience to a tyrannical government. As a moral being he is under moral obligations to turn tyranny into democracy, but legally speaking he must obey the law. If for conscience' sake he defy the law, he should submit to the punishment placed upon him and find his justification in the approbation of his conscience. In these days fortunately governments are rarely tyrannical and hence obedience to law is both legally and ethically right.

**Service.**—The duty of allegiance implies the duty of service. This may involve service in war, or in assisting in the maintenance of domestic peace, or service in public office, or on public works, such as roads, bridges, buildings, and fortifications. Every capable citizen in theory may be summoned to serve in the army or navy of his country. This may involve compulsory service for a stated term of years, as in France, or, as in the United States of America, in addition to a small standing army, citizens may be encouraged to form volunteer forces, and by training in times of peace thereby become a nucleus for the larger army needed in war. In case of necessity, however, every citizen capable of bearing arms may be summoned to war and is in duty bound to serve his country to the best of his ability. On a smaller scale citizens may be summoned to assist the authorities in the suppression of riots or rebellion, or to aid in the arrest of disturbers of the peace. In future great wars presumably women also may be drafted into war service for

the performance of such duties as naturally befit their physique. In urgent need, as in Russia or Poland, women may even be encouraged to enter military service and participate in battle.

The obligation to serve applies also to service in office. Inasmuch, however, as offices now are regularly salaried and are honorable, office-holding seems to be a privilege rather than an obligation. Yet if the burdens of office should outweigh its emoluments, the state could compel its subjects to assume office. This is exemplified by jury service which is properly a right not an obligation, yet being shunned, it has been made compulsory.

Service on public works is no longer common, though still known. In many rural communities of the United States of America, service for several days in the year on the public roads is often required. In case of need, however, the state can always demand the services of its citizens, and in times of war or sudden disaster private citizens may be forced into service and compelled to labor without pay. This was illustrated in San Francisco and in Italy after the earthquakes, where male citizens of all classes were compelled at the point of the bayonet to assist the soldiery in subduing the conflagrations.

**Taxation.**—Taxation in normal times takes the place of compulsory service in modern states. When citizens become free it is often detrimental to their interests for them to perform governmental service and neglect their own affairs. Hence they readily grant a small per cent of their income in lieu of service. This proves advantageous to the government also, for with money it can hire willing workers, always more efficient than compulsory service. In modern states, therefore, the gov-

ernment through taxation secures means to support a well trained permanent army and navy, and capable officials and skilled labor for public works. As the citizens themselves in democracies fix by law their own tax rates, and settle the items for expenditure and supervise the auditing of accounts, friction is thereby avoided. Government and people harmoniously coöperate in furthering general interests, for all recognize that joint success is individual benefit and that the injury of any part becomes the detriment of the whole.

One implication from this power of the state to demand service and tax is that it may deprive its subjects of their property at will. This power, however, is rarely exercised arbitrarily in modern times. The state may, if necessary, take away or even destroy property without compensation, and this is frequently done in times of war, conflagration, famine, or pestilence. But if the general safety is not involved, our modern theory of rights demands that the government be instructed to pay full value for all property confiscated for public purposes. Hence in the United States of America, for instance, though the state under the so-called power of eminent domain, may take land and other property for public use, the law provides that it pay adequate compensation to the owners, the amount of which is left to be determined by the courts.

**Control Over Taxation.**—Political writers fully recognize that the power of taxation is the very heart of modern governmental systems. Arbitrary and unequal taxation discourages enterprise and economic energy; antiquated methods of taxation are ruinous to progress. The best thought and wisest administration must be given to this department. At the same time corruption is most

likely to flourish where the "spoils" are. For such reasons the modern battles of democracy have regularly raged about principles of taxation. In England the struggle has been for the "control of the purse"; in the American Colonies, that there be "no taxation without representation"; and in general, that all taxation be for public, never for private, interests, and that the burden of taxes be equitably assessed. The motive in such struggles is not necessarily mercenary; experience shows that when the citizen body as a whole controls the tax rate and expenditures, public policy loses its military aspects and attention is concentrated on the upbuilding of internal improvements and systems of general education. In place of war come art, science, and happiness.

A citizen should realize that his welfare and that of his kinsmen and friends are involved in the welfare of the state. The natural love for the land of one's birth is strengthened by an appreciation of its helpfulness in securing happiness and prosperity. Patriotism is, therefore, intensified in devotion and government grows in efficiency, since officials know that they can rely on popular support, and citizens understand that the government has their best interests at heart.<sup>7</sup> It may be argued, therefore, that the final and, in some respects, the most important obligation placed on a citizenship is the obligation to take an intelligent interest in the government and policies of his country. Patriotism should not be thought of as a duty, or as associated merely with war; true patriotism should be felt as a privilege, to be exercised occasionally in time of war but regularly in times of peace.

<sup>7</sup> Pericles' panegyric on the State, in his *Funeral Oration* is well worth reading in this connection. See Thucydides' *Peloponnesian War*, vol. i, Book 2, paragraphs 34-48.

## CHAPTER XX

### POLITICAL PARTIES

**Political Parties as Agencies of Democracy.**—A body of citizens works politically through its electorate, and the voters who compose the electorate, in order to perform their share of the work of government efficiently, should have a general intelligent understanding of the forces at work in political life. If all men should attain maturity in intellectual development, public opinion, working through a democratically organized government, would be amply sufficient for all purposes. Modern civilization, however, is too immature for us to work on the assumption that all men are intelligent. A small per cent only are really expert in political affairs, and the average man has yet much to learn, even in a democracy. Under such conditions it is not strange that men often fail to see a question in its truer meaning, and form partial and distorted opinions in regard to public policy. Hence there regularly exist in political communities numerous factions and parties, each favoring a policy that in its opinion is essential to public welfare. The existence of these factions or parties provokes discussion, and out of discussion may arise wisdom and conviction. In our present stage of civilization, therefore, political parties have an important function; through them discussion takes place, rights are won or lost, and policies

good or bad adopted. They become an agency through which the citizen body works, in order to attain what at the time seems expedient and best. Rightly used they become indispensable to a democratic government; but perverted they corrupt democracy and weaken public morals. For such reasons an outline of their development and organization becomes necessary to an understanding of politics.

**Development of Parties.**—In despotisms differences of political opinion find no formal expression, and tend to degenerate into intrigues for place and power. In old-fashioned monarchies and aristocracies a ruling class has power, and maintains it permanently unless overthrown by war or revolution. Under such systems assassinations and armed rebellion are the chief means whereby an unpopular government may be overthrown. An advantage was gained when the principle of election was definitely established in governmental organizations; war chiefs and rulers were thus chosen almost from the beginnings of political life, although this political right was lost under autocratic governments but was regained in the era of republics. A great advance was made when elections became frequent and affected not simply the head of the state but all officers of importance. This development, so well known through Greek and Roman government, has proved to be a powerful agent in securing stability and peace. For when the system of election has become a familiar device in political life, if a body of citizens become incensed at the policy of those in power, instead of rushing to arms as formerly and risking all on their success or failure in war, they enter on a political campaign and seek to overcome their op-

ponents through the ballot.<sup>1</sup> After the election the defeated party yields power to the victors and awaits an opportunity to gain supremacy at the next election. Such a system has obvious advantages over the old method of rebellion or assassination. It can be at its best, however, only when all really important interests can thus express their opinions, otherwise revolutions will alternate with elections. It is essential also that a large part of the electorate be fairly intelligent, so as to decide wisely in regard to opposing policies, and also that they have a proper regard for law, so as to use honest methods in elections and to be willing to abide by the result.

**"Bossism."**—Evidently, therefore, an efficient party system can be found efficacious only when all interests are properly represented and when the electorate is largely made up of intelligent and law-abiding citizens. The evils so prevalent in the elections of democracies are not inherent in democracy, but are due to the neglect of fundamental principles; interests are not properly represented, large numbers of the electorate are often illiterate and ignorant of political issues, and party managers too often violate every law of political ethics in their eagerness for victory. Yet "bossism" in politics, is, after all, merely a passing phase of a period of transition. The so-called practical politician is often the veriest tyro in actual knowledge of political principles. His policy is crude and shortsighted and based on the Machiavellian principle that the end justifies the means. Permanent success is based only on a fostering of economic interests of all the people and on a strengthening of their intelli-

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<sup>1</sup> The vocabulary of political parties is still fond of militaristic terms, for example: "campaign," "victory," "defeat," "invade the enemy's territory," "marshal the forces," etc.

gence and morality. Corrupt politicians may seem to succeed for a time, but they ultimately earn for themselves only contempt and dishonor. All experience shows that permanent honor in the political annals of any country is paid only to those men who despise trickery and dishonesty and who labor intelligently for the larger interests of their fellow-citizens.

Obviously, therefore, the true policy of government should be to encourage by its laws intelligence and honesty in government. Political corruption and betrayal of trust should be sternly punished and electoral systems should be so adjusted as to favor honest voters and to encourage free expression of intelligent opinion. No wise democracy can afford to allow the primary, the convention, the ballot, and the count to be so manipulated as to thwart the will of the electorate. The machinery of government should not be adjusted for incompetency and dishonesty but for the accomplishment of the best work in the most economical manner. An intelligently educated citizen body with guaranteed civil and political rights and with proper facilities for the expression of its will, may always be depended on to assert its privileges and express its will. Democracy demands energy, intelligence, and aggressiveness for its maintenance, and these must be purposively fostered by the state as an indispensable condition of its own prosperity.

**The Rise of Political Parties.**—The modern party system originated in England through the cleavage brought about by the Revolution of 1688 and the separation of interests that arose between the supporters of the new dynasty and those who favored the old. The real interests of the Kingdom were, however, so poorly represented in Parliament that parties for over a cen-

tury and a half were made up of combinations of factions, voicing petty or personal interests rather than the general interests of the state. The reform of parliamentary representation, which began with the Act of 1832, allowed the truer interests of the Kingdom to be represented with a fair degree of accuracy. The result was the development of the modern British party system, which has been imitated with more or less success in most of the advanced nations of modern times. A brief explanation of this will first be given and then of the contrasting systems of France and the United States of America for purposes of comparison.

**The British Party System.**—The theory of the British political party is based on a two party system: the one emphasizing the landed and vested interests of the nobility and the established church, as the historic supporters of the throne, and finding down to 1832 its chief support in the powerful House of Lords; the other representing more directly the commercial, manufacturing interests of the nation and voiced in the House of Commons. Since these latter interests became dominant in the nineteenth century when Great Britain became the leading power, the Lower House has steadily gained prestige as against the other and in 1911 won a notable victory by depriving the House of Lords of its absolute veto power over legislation passed by the Lower House. Henceforth, if the Commons passes a bill at three successive sessions it receives the signature of the King without the consent of the Lords. Presumably the next step will be to reorganize the composition of the House of Lords and this may be expected within a very few years, since it is the declared policy of the Coalition now in power.

In late years the weakening Tory, or Conservative, party was strengthened by the addition of a conservative section of Liberals, favoring a policy of protection, the two unitedly forming the Union party. A racial interest also was stressed by the Irish members, the Nationalists demanding home rule, or autonomy. Labor interests also had formed a party so as to influence parliamentary legislation and a doctrinaire, radical interest was represented by socialist factions. The War brought about a coalition of all parties with Lloyd George at the head as Premier and at the close of the War a new election (December, 1918) was ordered. The party situation was obviously in confusion for Lloyd George, a Liberal, was at the head of the coalition which included Liberals and Unionists and was opposed by the old Liberal party headed by Asquith. Part of the Labor party split and joined the Coalition, and the Irish Nationalists were opposed by the Sinn Feiners advocating the independence of Ireland. The Coalition won a great victory at the polls, but it is obvious that new lines are forming, which may result in a realignment at the next election on a two-party basis—Unionist and Radical-Labor—or else in a series of small parties working together as a *bloc*, or coalition.

Assuming that the British party system is based on two parties as heretofore, it may be said that it is aristocratic in organization and presents marked contrasts to the rival American system across the seas. The leaders of each party, who attain leadership through their prestige and capacity, virtually dictate the platform and policy of the party. Whichever party or coalition controls, the majority of the House of Commons forms the King's Ministry and dictates national policy. This

makes it incumbent on them to keep in close touch with the House lest under the stimulus of the Opposition it be induced to vote adversely on some governmental measure.

In case of a new election, there is no long-drawn-out campaign preceded by great national party conventions.<sup>2</sup> Instead, the leaders of each party get together, prepare a statement of what they consider to be the issues to be fought out at the coming election, and then in a public and formal way announce these.<sup>3</sup> This platform is at once taken up for discussion and indorsed by the local party committees, who prepare their lists of candidates, under the general suggestion of the national leadership. Naturally the party record, the issues of the campaign, and the personality of the numerous candidates all enter into the situation. Since candidates do not necessarily have to be residents in the districts for which they stand, there is a somewhat large discretion possible in nominations, thus allowing for special arrangements between candidates and constituencies. Under this system the election becomes the occasion when the electorate has its opportunity to declare its will; as a rule the voters take a deep interest in the election, knowing that the results as shown by the membership of the Commons will determine the policy of the government for that Parliament.

**The French Party System.**—In France the many-party system prevails, and this in fact is the usual system

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<sup>2</sup> In 1918, Parliament was prorogued November twenty-first and the election was held on December the fourteenth.

<sup>3</sup> As illustration of platform methods it may be noted that in the election of 1918 the campaign was opened by Lloyd George and Bonar Law, who addressed a meeting in Central Hall and soon afterwards formally printed a joint statement of the issues. The non-coalition Liberals accepted as their platform a declaration prepared and adopted by the National Liberal Federation at Manchester and the Laborites issued an appeal headed "Labor's Call to the People."

on the Continent and elsewhere outside of English-speaking countries. In the Chamber of Deputies (the lower house), the members are seated around a semi-circular hall and that part of the circle to the right of the chairman is known as the Right, the opposite as the Left, and the Central between. The Right is made of groups of royalists, really supporters of the Republic, though in theory sentimentally attached to the descendants of the three former reigning families, and also of the most conservative of the avowed supporters of the Republic. The Center forms a *bloc* of moderate conservatives and radicals, who on the whole represent the liberal bourgeoisie, or commercial manufacturing element. The Left is composed of a number of socialistic factions representing the demands of labor and of doctrinaires.

Owing to the factional and coalitional aspect of French parties they are not systematically organized and they make little effort as parties or coalitions to elect candidates. Under the electoral reform law of 1919, however, the old single-district system is abandoned and a general ticket system based on departments, or departmental districts, of from three to six members has been adopted, along with proportional representation. This method distinctly aims to encourage parties by providing that on the ballot candidates be arranged under party names. The results of the election of November, 1919, showed evidences of greater stress on general party lines and in favor of the larger central group of moderate republicans. Each candidate, in general, aided by his friends announces his own platform and carries on his own campaign, so that candidacy is rather a personal affair, save that each is supposed to stand for some

fairly definite line of policy so as to be classified under one or other of the numerous parties. The chief influence in elections is exerted by the Administration, which uses *pressure* so as to have elected, if possible, deputies known to be favorably disposed. The outcome of an election does not necessarily indicate at once who will form the incoming Ministry. It merely shows where the general balance of power lies, so that the next step is for the meeting of the several factions of the majority set, the center, or Moderates, for example, combined with the least radical socialists, so as to agree on a candidate for the Premiership and on a division of the other ministerial offices among themselves. The list when made is submitted to the President of the Republic as a recommendation for appointment.

It is obvious that under this system the fall of a Ministry may perhaps be due to an adverse vote on some fundamental issue, but is equally as likely to result from some disagreement among the coalition factions and a determination on their part to dissolve and recombine on somewhat different lines.<sup>4</sup> The *interpellation*, or demand for explanation, followed by a vote of censure or endorsement, is the usual method of ousting Ministries.

**The American Party System.**—In the United States of America the higher development of political life and the early rise of definite issues, such as those of the Constitution, the bank, the tariff, and slavery, resulted quite early in the formation and development of political parties. For the first forty years of national history party organizations were in the experimental stage, but in 1832 the two great parties each adopted with slight variations the system based on the national con-

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<sup>4</sup> Cf. R. L. Buell, *Contemporary French Politics*.

vention and this mechanism has been so perfected that it stands forth as the acme of a centralized political organization.

In the United States a national election takes place every two years (in November) for the election of the Lower House of Congress and one-third the Upper House, or Senate. Every four years elections for the Presidency and the Vice-Presidency are also held,<sup>5</sup> so that in the fourth year period the Congressional and Presidential elections are combined. Each party in the early summer preceding a Presidential election calls a national convention for the purpose of formulating a declaration of principles and policy, the so-called platform, and to nominate candidates for the two executive offices. Congressional nominations are made by direct primaries or conventions in the several States, and these are managed by State committees under the general supervision of a Congressional party caucus committee appointed every two years for that purpose. Each party manages its campaign through a central, or national, committee. This committee is named by a national convention made up of delegates from the commonwealths. These are appointed by direct primaries or by State conventions made up of elected delegates chosen in the first instance by the voters of the districts or townships of the commonwealth. In this way the national committee is theoretically supposed to voice the wishes and policy of the party voters themselves, and in its work uses as its agents the various local organizations existing in the several commonwealths. Its function, therefore, is threefold: (a) to coöperate with the States so as to secure a harmonious body of

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<sup>5</sup>The formal election is made by the Electoral Colleges of the States on the second Monday in January.

workers down to the smallest precinct in the State; (*b*) to see that a platform is adopted and Presidential candidates named; and (*c*) to push the political campaign so as, if possible, to win the election at the polls in November. Because of the importance of Congressional elections the national parties become also State parties, and press their organization down to the primaries so as to control the several sets of delegates who ultimately will name the Congressional candidates.

This same method of organization, with local variations, holds true of the several States, in each of which there is a party state committee perfecting its organization, seeing to local platforms and the nomination of candidates and directing the campaign so as to elect the party candidates if possible.

**The Three Contrasting Types.**—These three types of political party organization represent practically the several systems of organization in use among developed nations. The American type is the most complex and the most highly organized and centralized, but the powers actually exercised by the organization are delegated by the voters themselves, who by theory indirectly name all leaders and policies. The French system shows the national party organization to be an artificial unity, made up frequently of discordant parts not always in full sympathy with their elected leaders in the Ministry. The real power lies in the departments and the local districts, in part controlled, however, by the influence of the administration and the Ministry in power.

The English system by contrast is aristocratic and takes its tone from the will of its national leaders, who have pushed themselves to the front and dictate policy to the districts. The opinions of local leaders, however,

must always be taken into account, in order that there may be cheerful and enthusiastic coöperation on their part with the national leadership and policy.

**Regulation of Parties.**—Parties are properly social organizations and not part of the legal machinery of the government. They originate or disband at the will of their members and are not mere creations of law. But so important are these modern organizations and so necessary for the successful performance of governmental functions, that their existence has become a necessity under modern conditions and they are in effect part of the unwritten constitution, since they are the formal means devised by democracies through which they express their will at elections. Admitting, as all must, the present necessity for such organizations, it becomes essential that public opinion should see to it that the means or agency devised for public purposes should not be made ends in themselves and perverted for selfish purposes and private gain. This tendency is especially marked in the United States where the mechanism developed is so efficient that if "politicians" by chance should secure control of the "machine," they can pass to themselves and their friends an endless chain of offices, "graft" on public funds, and incidentally woefully mismanage public business.<sup>8</sup>

As a check to such possibilities, using the United States as an example, under the pressure of public opinion, governments, national, state, and local, have little by little sought to regulate political parties so as to make them honest agencies as well as useful aids for the ex-

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\* An excellent study of corrupt methods, written in a style in imitation of Machiavelli's *Prince*, may be found in *The Boss*, by H. Champernowne.

pression of popular will. The extent of this regulation is worthy of notice. The government as a rule specifies the time, place, and manner of conducting elections, and regulates the primary or caucus.<sup>7</sup> It regulates the system of nominations, fixes the form of the ballot and provides officers to supervise the polls and to count the ballots. It may even bear the expense of conducting primaries and polls, and usually legislates against corruption and bribery and limits the amount of legitimate expenses. By law it defines what are political parties, what persons may exercise suffrage privileges at the polls, and it may also define how party members must register so as to vote at the party primaries.

Obviously the extent of regulation will vary considerably in different states and commonwealths according to the needs of local situations, but the necessity of some regulation is so manifest that now no state which allows political parties to exist at all permits them to act without any regulation whatsoever. The regulations now so common in the political world illustrate the fact that any social organization, whose interests become of general importance, must submit to governmental regulation for the welfare of the state.

**Proportional Representation.**—As an illustration of one aspect of regulation attention may be called to requirements for minority or proportional representation, a system long advocated by reformers but largely neglected up to recent years because no system suggested seemed simple enough to be comprehensible to voters and

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<sup>7</sup> The primary is the initial gathering of party voters to decide on candidates or measures. A non-partisan primary also is in use, for members of all parties. The term *caucus* is often used in the sense of a primary, but is more properly a gathering of party leaders or representatives for the formulation of a party policy.

readily applied by those in charge of the count. The theory back of the reform is that government by the majority, though far better than minority rule, is not so democratic as rule by all the people through their representatives. Minority or proportional representation seeks to accomplish this aim by providing a form of election in which any proper proportion of the electorate may be represented, in a legislature for example, by those who will voice its desires. This is considered to be a device for the improvement of legislatures, as an alternative to the direct method of the initiative and referendum.

Omitting reference to the many schemes suggested,<sup>8</sup> each of which has or has had its supporters, a brief statement will be made of the two systems most favored—the preferential or Hare system and the Belgian system as worked out by Professor Victor d'Hondt, of the University of Ghent.<sup>9</sup>

I. *The Hare System.*—In the preferential scheme each voter indicates his first, second, and other choices among the candidates for an office. In the count the officers in charge first ascertain the quota which each candidate must receive to entitle him to an election<sup>10</sup> and then count first choices only. Whenever a candidate receives a sufficient number of votes to entitle him to an election, he is declared elected and henceforth other ballots having his name as first choice are counted by taking their second choices, in this fashion wasting no votes. This method

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<sup>8</sup> See for many of these Commons, *Proportional Representation*, and John H. Humphries, *Proportional Representation*.

<sup>9</sup> For detailed illustrations of this see Seymour and Frary, *How the World Votes*, vol. ii, Chap. XXIX to page 202.

<sup>10</sup> This is done by dividing the whole number of votes cast by the number of offices to be filled.

is followed throughout until all the successful candidates are ascertained. On a short ballot this method is fairly simple for the voter and not hard for the counter, but naturally would prove impossible for such lengthy ballots, as are commonly used in the United States.

II. *The Belgian System.*—The d'Hondt, or Belgian, system requires that each party arrange its candidates on the ballot in the order of importance, for the reason that the successful candidates will be selected from the party lists in the order of arrangement. The voter then merely indicates his choice of parties by marking the square at the head of the column, although provision is made for "splitting the ticket" if desired. In the count a quotient is obtained by a simple mathematical operation and by a series of easy divisions the results are declared speedily and assignments made to the respective parties. This system is simple, speedy in operation, and will likely win favor rapidly. The German Republic adopted the system for its first national election (1919) and found it to work admirably, even though a very heavy vote was cast through adult suffrage. The French system of 1919 follows in the main the Belgian plan but a somewhat different mathematical operation is performed in arriving at the result.<sup>11</sup>

In both these systems the general ticket, of course, must be used as against the single-member district and this also has its distinct advantages. Great Britain is planning experiments in the direction of a general ticket by arranging that boroughs having the right to three or more members in the House of Commons shall elect by

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<sup>11</sup> Articles descriptive of the German and French systems may be found in the *American Political Science Review*, August, 1919, pp. 361-378 (Germany), and February, 1920, pp. 117-123 (France).

general ticket in districts of from three to five members and by a later bill these will probably be elected by some form of proportional representation.

It seems obvious that in the near future, some of the American commonwealths will try out systems of general tickets and proportional representation and presumably will find them feasible as other countries have, in which case other commonwealths will speedily imitate the successful experiments. In this fashion there should slowly creep into American city councils, state legislatures, and administrative boards a representation of minorities as well as of the majority, and this will have a distinctly democratic effect on the political-party system.

**Party Issues.**—The issues that separate political parties are generally, though not always, economic. The state is so important a factor in conserving and strengthening economic interests that these eagerly seek to have a dominant voice in governmental policy. Parties as a rule tend to identify themselves with one or several kindred interests so as to secure the support of those engaged in such economic occupations. There will regularly be representation of such interests, for example, as those of the landed, or farming, interests, or commerce, manufacturing, mining, and fishing; or there may be a representation of economic classes, such as labor parties with a platform of labor reforms, or an agrarian movement such as the former Populist party of the United States or the Non-Partisan League of the present; or, again, some economic policy that will affect numerous classes may be under discussion, as socialism or the tariff or questions of taxation or of the regulation of corporations and trusts. Occasionally there may be special issues of temporary importance involving questions of

religion, morality, education, or some particular phase of international policy such as the question of the League of Nations in the campaign of 1920. But these issues as a rule are not lasting nor are they broad enough to form the basis for a permanent national organization.

Again, entirely independent of the particular issues at stake, a party may gain strength by posing as a representative of conservatism, favoring a policy averse to change, and thus securing the support of those who prefer known ills to possible dangers. On the other hand, a radical aggressive party may win support by advocacy of fundamental changes, on the ground that such are in the line of progress. As a rule, it will be found that the issues involved in an election turn either on the maintenance of the *status quo*, or on an economic question involving the clash of differing interests.

## CHAPTER XXI

### POLICIES AND ACHIEVEMENTS OF GOVERNMENT

**Polity and Policy.**—The preceding chapters have been devoted primarily to the study of the development and differentiation of government and the relationship between it and the state with its sovereignty. The organization in which the various departments of government are combined into a systematic whole is sometimes called the *polity* of the state, a Greek word (*πολιτεία*) which really includes also the notion of *policy*, implying a study of the principles underlying governmental *action*, having reference to some well defined aim or plan. If, therefore, a person understands the polity and policy of his State, he understands his government, its activities, its ideals, and standards of action. Fully to understand these he should know the historical development of the political principles underlying national history and the relation of these to the larger world principles of political activity, and their relation to the principles of social organization as described in sociology.

The power of sovereignty, of course, is the source from which governmental agencies derive their vigor, enabling them thereby to formulate policies, both domestic and international, which when formulated are then put into action through the proper departments of government. A nation's policies may include many petty policies that come and go with changing currents of pub-

lic opinion, but underneath these are bedrock policies of a permanent sort, traceable with occasional variations or aberrations through generations or even centuries of national history.

**Domestic and Foreign Policies.**—Such policies are fundamental because they vitally concern the life and prosperity of the nation. *Domestic policies* aim to safeguard citizens in their lives and property and to furnish to them enlarged opportunities for the pursuit of happiness. *Foreign policies* aim to safeguard the life and property of the nation as a whole and to furnish opportunities for national growth and national welfare. The world may be considered from one point of view as made up of states suspicious and hostile one to the other. Admitting that they should be fraternal in their relations and hoping that in time they may become so, it is safer to assume an attitude of distrust and to be on guard against attacks from powerful rivals. Every state having potential enemies must, therefore, formulate policies aiming to safeguard national existence and to secure opportunities for growth in population and national wealth.

Properly such policies should conform to the best national ideals and be in harmony with world standards of ethical conduct. Unfortunately, however, the principles embodied in Machiavelli's teachings are favored by nations desirous of self-aggrandizement at the expense of their neighbors, so that too often such states use lower moral codes in dealing with other states than they employ in their domestic policies. Consequently the policies of well meaning states in order to be effective have to include a policy of preparedness for offensive or defensive warfare, on land or sea, so as to impress on

excessively ambitious states the danger of unwarranted aggression.

**Policies Should be Understood by the People.**—A nation with well formulated policies should never rest satisfied with the mere formulation of them. They must become rooted in the national mind through education and tradition, and national action should closely conform to national policy so that the nation may become accustomed to see its historic policies actually exemplified and applied from time to time to concrete problems. In this way a state's policy will strike deep root into the everyday thinking of the average man, so that his reaction to a situation will become well-nigh automatic. Such policies, of course, undergo slight modifications as new conditions and newer interpretations of national destiny arise, but public opinion, guided by the press, readily adjusts itself to these. In times of stress rather radical modifications may become necessary, and under such conditions thorough and lengthy periods of discussion should indoctrinate the public mind with the newer aspects of the situation. In this way the natural leaders of the people will incline to support the newer modifications, since they would have an intelligent appreciation of their importance for national safety and welfare.

If a nation's interests demand that its policies be understood and accepted by its citizens, obviously every intelligent citizen should seek to comprehend them, since his prosperity and happiness depend on his keen appreciation of their value. Especially should they be studied by those who are authorized to administer the power of the state, since upon their intelligent comprehension of national policies and their ability to formulate modifications of these when necessary, may depend consequences

bringing weal or woe to the nation. A double obligation rests upon those who wield the sovereign powers, not of an ossified or degenerate state but of one in the van of political progress—a State, like the United States, standing not for Machiavellian principles of success at any price but for broad and generous platforms based on humanitarian principles and a profound regard for the Golden Rule.

**National Preparedness.**—One must not forget, however, that all nations are not eager for world peace and fraternal relationships. He should remember that, after all, national and human ambitions are often strangely sordid and wise statesmen should not endanger national prosperity by investing in Utopian rainbows or in international gold bricks. Men from time immemorial have dreamed of the Golden Age when swords shall become plowshares, and spears be turned into pruning hooks, but Novicow in his *Essay on War* quoting from various authorities says that, "From the year 1496 B.C. to 1861 A.D., in 3,357 years, there were 227 years of peace and 3,130 years of war, or thirteen years of war to every year of peace. Within the last three centuries there have been 286 wars in Europe. From the year 1500 B.C. to 1860 A.D. more than 8,000 treaties of peace meant to remain in force forever were concluded. The average time they remained in force is two years."

Under such circumstances one must agree with Plato and Aristotle who both argued that however desirable peace is, a wise state will always be prepared for war as the best preventive against sudden attack by an unscrupulous enemy, for as Aristotle added, "People seldom attack those who are well prepared," or as Washington put it, "To be prepared for war is one of the most

effectual means of preserving peace." The state, as it were, stands in the presence of its fellow states, sword in hand, preferring peaceful policies, but ready, if necessary, for war in defense of national life and welfare. As an exponent of peace the state should base its policies on the eternal principles of justice and fair play and through its diplomatic agents, through treaties, agreements, and *ententes*, should endeavor to live amicably in the international world, following the principle of live and let live. But when there arises, as Jefferson put it, "a long series of abuses," then another policy becomes necessary, the statesman gives place to the warrior, and armed forces strike in behalf of the nation so as to bring to the arbitrament of battle the test of competing systems and policies.

Thus in every state and especially in a democracy, where in the long run public opinion determines national decisions, it is of the utmost importance that citizen, statesman, and officer in army or navy should comprehend the national policies of their country, so that in times of crisis they may act quickly on the basis of common understandings, thereby avoiding the waste of time involved in so-called campaigns of education, like that in the United States from 1914-1917.

**Growth of Policy.**—Policy in the European mediæval period of history was to a quite large extent dynastic or personal in character, rarely rising to the dignity of a carefully considered national policy. But just as Grotius in 1625 marked a new era in law and diplomacy through the publication of his famous work, *De Jure Belli ac Pacis*, so in 1648 the Treaty of Westphalia marked the time when the European powers took into consideration *national* factors of geography, race,

religion, and economic interests in reaching decisions of international policy. The Allied Congress of 1918-1919, irrespective of whether its work was well or poorly done, will surely be noteworthy because of the close attention it gave to geographic, racial, and economic considerations and to the claims of nationality based on common customs and traditions. The emphasis placed on such matters by this notable gathering of states indicates clearly that the permanent policy of any given state must rest on quite similar considerations. It is, therefore, not sufficient to teach policy as merely a list of catalogued policies each defined in dictionary form. Every particular policy should be shown in its relations to other and larger policies and the basis and history of these should be clearly understood, so that the interested citizen or nation's representative will absorb the spirit of national policy and be able intuitively to apply principle to situation. Great Britain, for example, has had for centuries as its fundamental policy the maintenance of its supremacy on the seas and this is so ingrained in the British mind that national action with that end in view is well-nigh automatic.

**American Policy.**—The American policy corresponding to this is the Monroe Doctrine, broadening out into a policy of Pan-Americanism, the most fundamental and most important of all its policies. Unfortunately domestic policies and particular interests are so much better comprehended in the United States than are its international policies, that too often larger interests have been subordinated to immediate interests, perhaps because the leaders of those times failed to grasp the underlying principles of American policy and hence lacked

insight into the proper solutions for the problems before them.<sup>1</sup>

Then, too, its leaders are too inclined to assume that national wisdom began and ended with the Revolutionary fathers, whose descendants consequently should find their whole duty in a static devotion to the teachings of the dead, who lived in a petty and defenseless state before the era of steam or electricity. The United States, however, is not so decrepit with age that it can live only on its past thought. The nation is still filled with youthful vigor and has a forward as well as a backward look. For that reason its policies are expanding policies, broadening out, so as to meet newer conditions and situations, so that one must have a flexible mind properly to appreciate the national point of view. The little Colonies of 1776, scattered for the most part along the Atlantic coast, with a combined population less than that of Chicago at present, built well and wisely for their day, but they themselves would have been the first to admit that the passing years would demand a broader basis and a wider outlook.

**Basis for Policy.**—As a very brief indication of the bases from which policies are built up attention may be directed to the conditions that tend to determine policy, premising with the statement that practically static conditions, or a situation freed from the danger of war, determine one line of policy, and a dynamic competitive system necessitates a quite different policy, since the danger of war must always be taken into account. In modern times isolated or neutralized, protected states represent fairly well the first, and the second is repre-

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<sup>1</sup> For brief studies of American diplomacy see under John Bassett Moore, John H. Latané, and Carl R. Fish in the Bibliography, Sec. II.

sented by the average state environed by rival states not averse to war.

**The Factors of Population and Land.**—The chief conditions to be taken into account are the factors of population and land. A state having an expanding population on a limited territory must plan either to intensify its industrial life through manufactures and commerce, developing thereby an urban civilization so as to accommodate its increasing population, or must find outlets for the excess of its population through emigration, colonization, or the forcible seizure of neighboring territory. Failing these possibilities a policy of stationary population through "race suicide" methods is the only alternative. If the intensification of industrial life is emphasized, then trade routes must be opened and kept open and metal ores and other raw material must be secured, preferably from national lands if possible, otherwise through importations, or the development of colonial possessions having such, or as a last resort through the seizure of the lands of weaker powers having the needed material. If a policy of expansion is followed, conditions determine whether this be peaceable, as, for example, through national lands hitherto unutilized, or by taking possession of uninhabited or thinly inhabited parts of the earth; or, on the other hand, whether the expansion be through aggressive wars against weaker or rival states. A landward expansion involves a stress on military power, but an expansion overseas necessitates sea power and hence a reliance on a great navy. These in brief are the fundamental conditions on which policy is based, though, of course, there are many other factors such as racial affiliation, racial hatreds, religious differences, and distinctions of color,

language, and type of civilization that enter as factors into the situation. It is obvious that the necessity for "a place in the sun" may drive a state into an aggressive policy towards its neighbors. It is for such reasons that Machiavelli and his modern followers urged that a state in its foreign policy should be unmoral, free from the ethics of social existence, using the Darwinian code of the survival of the fit and the destruction of the unfit or weaker competitors.

**Political Contributions of Nations.**—A study of policies both foreign and domestic might also be made by noting the great and permanent political contributions accomplished by historic nations past and present. Such contributions in the main represent the expression of national purpose and hence are clearly allied to policies of a more formal sort like those of expansion and conquest.

It would be rather a lengthy task to try to estimate with any completeness the relative contribution of the world's great historic states to political civilization, so that a bare sketch only will be given as a suggestion. It is obvious, for example, that notwithstanding the rise and fall of dynasties and the passing of races, there developed in Egypt, in India, on the plains of China and Mesopotamia, and in the cities and harbors of Asia Minor, great patriarchal and commercial empires that fixed the fundamentals of government and state, and that the petty states of classical times inherited from the South and the East all that was really valuable of an obsolescent civilization.

*In the Classic Period.*—In Phœnicia, the most modern of ancient Asiatic governments, and in Carthage its great colony, in Greece and in Rome, centered the contributions

of preceding ages, as each, one after the other, assumed supremacy and made its own offering to the common stock. From the first three came that emphasis on commerce and colonization which makes a modern Britisher feel perfectly at home as he reads of the expansion policy of these nations; Athens, in addition, developed a workable alphabet for literary purposes and through its philosophers taught later states how to reason about the principles of government and to work toward higher and better standards of political life. The genius of Rome lay by contrast in its emphasis on law and administration. By the aid of Greek philosophy it enlarged its customary law into a code that will stand for many future centuries as the high-water mark of attainment in respect to civil law and rights. By its militaristic energy it conquered and brought into civilization the barbarian tribes of the North and revivified the decadent nations of Africa and Asia Minor. By its administrative and centralizing capacity it developed a system of political organization that finds its best expression to-day in the imperialistic hierarchy of the Roman Catholic Church, and in the highly centralized governmental organizations of France and Japan. Through the Church, the Holy Roman Empire, and the numerous commercial cities of Italy, France, and the Hanseatic League, the civilization of the greater Rome was continued, differentiated, and finally welded into a composite of many aspects through its partial adoption by the many jarring nationalities that now occupy Europe.

*Modern Contributions.*—From England in mediæval and later centuries came an efficient judicial system, a successful colonial policy, and a Parliament working out through a joint Cabinet an harmonious coöperation of

executive and legislative interests. Through its devotion to commerce and sea power it has expanded, carrying its civilization into every quarter of the globe, and will hold the world's supremacy as long as it can dominate the seas.

France, a true daughter of the Roman Empire, as shown by its capacity in war, in law, and in administration, came to the front in a new rôle at the end of the eighteenth century, set fire to the dry tinder of European politics and intoxicated the political world with the inspiration derived from the *Marseillaise*, and the ideals of democracy contained in the motto, *Liberté, Egalité, Fraternité*. This influence spread through western and southern Europe, passed to the Latin colonies in South America, rivaling there the competing influences of Spain and the United States, and even affected in the latter country the policies of such democratic leaders as Jefferson and Monroe.

Germany added its contribution to the world's civilization in the form of applications of scientific principles to governmental organization and functions, but at last its vaulting ambition overleaped itself, and like Sisyphus, having almost reached the anticipated goal of supremacy, it must start again to push upwards from the bottom. Even little Switzerland nestled in its mountain plains and valleys, by conscientious devotion to industry and education has become, as it were, the capital of the League of Nations, houses within its borders the homes of numerous international unions and organizations, and, by its experimentations in new forms of democracy, has profoundly influenced the world of states.

The United States also is no mean factor in the modern political world. From it has come the federation,

the written constitution, an expanding democracy, a highly organized system of political parties, and with it all a humanitarianism cosmopolitan in its scope, aiming to make wide applications of the principles of democracy. This development has been greatly aided by its comparative freedom from the danger of invasion, its system of general education, and the inventive capacity of its people, devoted to the development of a large, well watered, fertile land rich in fuels and minerals. Through these achievements the nation, with its composite racial population, is deeply impressing its governmental type on the political systems of the world, and has by no means yet reached the height of its powers.<sup>2</sup>

Added to all these there are many experiments being made in odd corners of the earth, such as in Australasia, Finland, Scandinavia, and Switzerland, so that the conviction might readily grow that the state, in its governmental functioning and organization, is still plastic, is still adapting itself to newer conditions and by steady improvement is becoming unquestionably the great agency through which humanity will continue to accomplish its ends of social development.

**New Zealand.**—As an illustration of a domestic policy of what may be called a commonwealth of the "newer democracy" the social legislation of what some have idealized as a sort of antipodean Utopia may be mentioned.

New Zealand is by no means a great state, nor even in itself a colony<sup>3</sup> of international importance, yet within its borders some rather radical experiments in democ-

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<sup>2</sup> Note, for example, how W. T. Stead was impressed by what he called "*The Americanization of the World*."

<sup>3</sup> It is, since 1907, the Dominion of New Zealand. For references on the government of New Zealand see Sec. IV of the Bibliography.

racy are at present being carried on. This group of islands is comparatively small, having an area about that of Colorado or Nevada. Its population, all told, is slightly over a million, not so many as may be found within the borders of Connecticut. The chief occupations of its people are farming and grazing supplemented by manufactures and mining. It has its commerce and is in close touch with its neighbors in Australia, twelve hundred miles away, and with the mother country, which by the prestige of its flag shields its offspring from many international complications and burdens. In this remote corner of the earth, freed from the fear of hostile attack, with natural riches and a population over ninety-eight per cent British by birth or descent, with the suffrage in the hand of every adult man or woman, and a virtually autonomous government, English individualism is free to work out democratic activities which, if they prove successful, will become a sort of pattern for other democracies.

**The Domestic Policy of New Zealand.**—Without commenting on the success or failure of its numerous experiments in legislation, in respect to which references for reading will be found in the Bibliography, attention may be directed to the democratic system of government and the functioning of the newer democracy. Adult suffrage is allowed a free hand by careful provisions for free nominations, the Australian alphabetical secret ballot, effective Corrupt Practices Acts and a half-holiday for workers on election day. Civil service rules, non-partisan politics, and official responsibility help toward honest administration. The government owns its railroads, manufacturing its own cars and locomotives; it owns steamship lines, telegraphs, telephones, coal

mines, and savings banks, a parcels post, a national bank, and a loan office which lends money on easy terms and low interest to the citizens. There is a government insurance company competing with private insurance companies and a governmental management of trust estates. All these and other similar undertakings illustrate the bewildering variety of activities carried on by the state. It arbitrates disputes of all sorts, guarantees land titles, simplifies law, furnishes legal advice and service free or at low rates, serves as tourist agent for travelers, establishes model farms, and teaches scientific farming. It uses the probation system for juveniles, colonizes its unemployed, starting them in business as farmers, provides pensions for the aged, and is seeking to abolish abject pauperism altogether. It serves as agent for its farmers, keeps their goods in cold storage when necessary and sells them in London, charging only commission at cost. It aims to establish a minimum wage, a short-hour day and has eliminated sweat shops; it carefully regulates the labor of women and children, has efficient sanitation laws for manufacturing establishments and shops, and has a remarkably low death rate. It directly employs its own force in the construction and maintenance of public works, and stimulates industry on the part of its workers by coöperative methods. It is abolishing the slums by inducing urbanites to move toward the outskirts and into the country, and by helping workingmen to build homes by loans at low interest. Its cities are attractive with parks and playgrounds and private residences vie one with the other in adorning their homes and grounds. Education is emphasized and is for the most part free. There is no state church, and no state aid is given to any religious body. The govern-

ment seeks to equalize opportunity for all, to diffuse wealth, and to discourage the rise of millionaire fortunes. Its ideal is a land of plenty without pauperism or excessive luxury, where healthy bodies and well trained minds may become normal and furnish the basis for continued prosperity.

Whether this experiment in democracy will succeed is still a problem. Certainly the economic and racial conditions of New Zealand are favorable, and its safety from international complication seems assured. If its government continues to plan wisely on the basis of a carefully prepared and well balanced budget, and strengthens in every possible way the morality and intelligence of its citizens, there seems no inherent reason why it may not become "Newest England" in a large and prophetic sense.

This social legislation was enacted chiefly during the period from 1884 to 1910. Little progress has been made since, if any, owing to the setback of the Great War and to a growing antagonism between labor and capital, the latter of which naturally resists vigorously attacks on profits or on the growth of capitalism. The inhabitants of New Zealand themselves are by no means convinced that they live in paradise and sometimes look longingly towards the seemingly better clover fields farther on. Their social legislation did not come as the result of broad visions, working constructively towards a carefully planned program. In fact, it is surmised that their outlook is provincial and because of that fact they simply sought to eliminate from their little Dominion the harsher aspects of life, to work together coöperatively as near neighbors, and also followed the natural British tendency to "clean up" and have an attractive home,

socially, economically, and from the standpoint of solid comfort. Its experiments, before they can be considered successful, should stand a generation or two, and when transplanted to larger nations must be able to show adaptability to a rapidly changing environment. Yet after all is said, the legislative experiments of New Zealand and of the kindred Dominion of Australia are furnishing extremely valuable suggestions to the larger democracies of the Americas and Europe.

## CHAPTER XXII

### GROWTH OF DEMOCRACY

**The People.**—If by the term *people* is meant the collective mass of population domiciled within a state, the relation of these to the state is obvious; they are its subjects, owing it obedience and allegiance. But they are not mere subjects; they are citizens also, for they have rights as well as obligations. After all, the only justification for the existence of a sovereign state must be found in its helpfulness and utility to its people. It owes to its citizens protection and aid in their struggle for betterment in life. Every citizen may demand that much from his state, and should rightly feel aggrieved if it fails to do its part. Yet the failure of the state to do its part has been the problem of the ages and will probably remain so for many years to come. States do not satisfy the demands of their subjects in these respects, and indeed governments have seldom admitted that they were in duty bound so to do. The reason for this difference of opinion is not far to seek. Governments have regularly been aristocratic in the sense that the power of the state has rested in comparatively few hands. The members of this ruling class always assume that they have a sort of inherent if not divine right to rule, either because of the quality of their birth or their wealth or their intelligence. As rulers, they also assume that they are entitled to the best and largest share of

the comforts of life, and that this share should first be secured before much thought be given to the well-being of the other members of the community. This attitude of mind is observable in all parts of the world and in all kinds of civilization. The wise and the strong naturally win the rewards of life, and it is assumed that the weak and the lowly should be content with bare subsistence.

**The Ideal of Democracy.**—On the other hand, the democratic ideal of citizenship has always had advocates. Whether "all men are created equal" or not, seems not so important as the question whether all men can become equal; and, if so, whether they should not be given the opportunity to attain equality. Religion has endeavored to answer by assuring men of their equality in heaven or in God's sight, but men rather seem to prefer their equality on earth, possibly so as to be the better prepared for it in the other world. Governments have so regularly favored inequality that some political theorists<sup>1</sup> hold that equality will become possible only when the compulsory aspects of government are abolished. Believers in the utility of the state who also advocate equality, argue that it can best be obtained through the proper regulation and utilization of governmental agencies. Whether governments will remain aristocratic or ultimately become democratic is, however, a question for future settlement. Yet for a proper understanding of the tendency towards democracy and the conditions that affect this tendency, a short sketch of the development of the democratic idea may be of service.

**Three Historic Forms of Democracy.**—We may distinguish, on the whole, three historical forms of

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<sup>1</sup> Anarchists and individualists.

democracy: (*a*) tribal or communal democracy, common among all savage and barbarian peoples and prevalent in the earlier forms of village life; (*b*) conservative democracy, based on economic capacity and intelligence, and found generally among commercial communities; (*c*) radical democracy, dominated by ideals of human equality, seeking to bestow political privileges irrespective of race, sex, or social conditions.

I. *Tribal Democracy*.—In primitive hordes and in the early patriarchal period, so far as their systems can be understood to-day, there prevailed in their political organizations a rude sort of democracy, based on the right of every capable adult male to participate in important decisions. Numerous illustrations of this exist to-day among savage tribes and in village communal life as observed in Russia, India, and China. Women generally had what may be called civil rights in life, property, and family, and at times even had political rights when heads of families.<sup>2</sup> There was, however, a growing tendency for a woman to merge her legal personality into that of brother, father, or husband. Likewise the development of a body of elders composed of heads of families and powerful chieftains tended to develop a class of persons having peculiar privileges and unusually large governmental powers. Through war came slavery and a consequent servile class without rights, mere living implements of labor classified along with cattle, according to Aristotle. The multiplication of wealth in the form of flocks, herds, slaves, and landed interests accentuated and fixed social distinctions. Thus developed a system in which privileged classes of noble, learned, and wealthy men exercised all political power, forming the electorate

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<sup>2</sup>In the Russian *Mir*, for instance.

of their respective states. Below these were citizens and freemen, having no well defined political rights, but with customary civil rights of life, property, and family, although these were not carefully safeguarded against the tyranny or despotism of the ruling class. At the bottom of the scale were freedmen and resident aliens having a few civil rights, and a vast mass of slaves with practically no rights whatsoever.

II. *Conservative Democracy*.—The next stage of development came with the rise of commerce and industries. Through these occupations arose from the lower classes wealthy, brainy men, too important to be ignored in the governmental system, who slowly acquired larger civil rights and some share in political power. If this form of wealth and influence increased so as to overbalance in importance landed wealth, it became the really efficient factor in the state, sharing powers with the older privileged classes, and developing thereby a sort of democracy; a democracy, however, in which the mass of the population—slaves, freedmen, and resident aliens—had no voice.<sup>8</sup>

In those early days popular democracy in the modern sense would have been impossible. Citizenship regularly implied racial kinship; there was no system of naturalization except through the awkward method of adoption. Furthermore, slavery was looked on as a natural and proper condition for inferior and conquered races, and no theorist was rash enough to suggest that such persons should be freed and have governmental powers placed in their hands. Consequently, when the states of the classi-

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\* The reforms of Solon in Athens recognizing a middle class, or *bourgeoisie*, and the prominence of the *equites* (modern capitalists and industrial leaders) in Rome are illustrations.

cal period placed the suffrage in the hands of those who were citizens by right of birth, even though these numbered a small minority of the population, they believed that they had the most liberal possible form of government, and in their theories, as manifested in classical political writings, set up their systems as the ideal of political development.

III. *Radical Democracy*.—Many causes contributed to the development of a larger idea of democracy. The Stoic and the Christian teaching of human rights, individuality, and brotherhood, and the extension of Roman citizenship throughout the civilized world tended to dignify the individual and to disown slavery, especially as this institution was losing its economic importance through the rise of a system of vassalage. The economic development of western mediæval Europe along lines of commerce and manufactures emphasized the need of a more energetic laborer than the slave or the serf, as a necessary factor in this development; and the increase of general intelligence through the printing press and commercial intercommunication helped to bring about a condition in which the privileged classes became relatively less useful to the state and began to lose their monopoly of political, social, and intellectual privileges. When slavery and its modified form, serfdom, had disappeared from the larger part of Europe, and when militarism and dogmatic authority had yielded place to commercialism and intellectual flexibility, modern democracy became possible and slowly began to push its way into the governmental systems of Europe.

It is well to note that the democratic movement of the earlier stages is fundamentally not along humanitarian lines. It is simply the desire of the more capable part

of the masses, who were called into a life of larger activity through the economic demand for intelligence and business acumen, to secure for themselves a share in governmental power. Their interests demanded it, and they were willing to fight for it if necessary. But every advance they made afforded a larger place for those immediately below them. As long as there was an increasing demand for more intelligent labor, the supply was forthcoming; and as it came, it sought after political power. This power was, of course, the means to an end. Men desired to be secured in their rights and possessions, and knew that these would be safer as they gained a larger voice in government.

The rapid development of machinery in the eighteenth and nineteenth centuries stimulated a demand for labor of any sort, and all men became important in industrial countries. Stress ceased to be placed on birth or rank but rather on the capacity for intelligent work. The free farming lands of the American Colonies also called for workers and gave men opportunity to show enterprise and intelligence in the cultivation of the soil. Throughout this period, therefore, developed a strong emphasis on man as man; all alike, it was argued, should have opportunities to attain wealth and power. Stoic philosophy is the form of the theory of natural rights, and Christianity with its ancient emphasis on equality and fraternity again came to the front in support of this new condition. The result was a new sort of democracy. Heretofore political power had developed *pari passu* with economic capacity, but then began a tendency to give political power irrespective of economic capacity. If men were created equal, as the theory was, they ought to have political equality at least, on the assumption that, by the

aid of the ballot, every man could win his proper place in the social system.

**Contrasts between Conservative and Radical Types of Democracy.**—These two theories of democracy are still in conflict. The one argues that the possession of political power should be based on an intelligent economic capacity; the other argues that every adult, even every woman, should have the ballot, in order to win rights and build up a capable personality. From the first come laws demanding intelligence tested by an educational qualification, and economic capacity tested by the possession of taxable property. From the other come demands that the ballot be placed in the hands of every person, including the enfranchised slave, the illiterate peasant, and the unskilled laborer relying on his muscle for daily bread.

The materialistic democracy of the one easily develops ideals of the other through its emphasis on broad knowledge and intellectual capacity. Every commercial era is regularly accompanied by Utopian dreams of a still broader civilization, when every man will count as one and all men alike, irrespective of birth, will have opportunity to develop the best that is within them, and to attain any station to which their capacity entitles them to aspire. Along such lines dreamed Plato in commercial Athens, the Christians and Stoics under Roman sway, Sir Thomas More in the Tudor period, the Levellers of Cromwell's time, and the philosophers of the social contract during the last three centuries. The social dreams of agricultural communities are anarchistic, like Tolstoi's, but commercial communities develop socialistic Utopias like that in Edward Bellamy's *Looking Backward* and *Equality*.

**Underlying Principles.**—In this development of democracy the working of two principles is evident: (*a*) an economic condition that demands in its workers capacity and intelligence will tend to bestow political rights on such men; (*b*) broad, ethical, idealistic principles, like that of human brotherhood, may influence a community in such a way that a government may create by law a condition of political equality and then purposively strive to raise the social and economic standards of its people, that they may exercise with efficiency the political powers placed in their hands.

Generally speaking, four great influences have contributed toward this end:

1. The marvelous development in the use of machinery, which began in the last half of the eighteenth century in England and which completely revolutionized the entire economic life of civilization.
2. The social contract theories of the British-American and the French revolutions and the political influences that followed from the establishment of the American republic and through the French theories of liberty, equality, and fraternity.
3. The great religious movements of the eighteenth and nineteenth centuries, which stimulated social virtues and emphasized the common brotherhood of humanity.
4. The rise of a system of free common schools and of higher education and a remarkable multiplication of scientific knowledge.

Economic changes gave the conditions, religion and education stimulated and trained the mind, and political theories taught men how to hold fast and to strengthen by political devices what had been won for civilization.

**Democracy Based on Intelligence.**—These great influences show that real democracy comes through increased mentality and implies a highly developed civilization. For this reason it affects the whole of social life, not simply the political aspect of it. Democracy means that in economic life no man should be born into a condition of economic slavery; not that every person should be fed and supported at public expense, but that he should have opportunity to develop his capacity for work in whatever field seems best suited to his personality. This involves a far vaster and wiser system of education than any that yet exists. Plato, in his *Republic*, rightly assumed that the chief object of government was the proper training of its citizens. No governmental expenditure brings such tangible returns as that for education. Educational systems are yet in their infancy and largely mechanical and unscientific in their operations; but perfection cannot be attained in a day nor through a corps of poorly trained, wretchedly paid teachers.

The Japanese in their war with Russia clearly showed that scientific training is an essential element in a war campaign. Material resources and a mere form of equality will never bring about national supremacy; nor does success ultimately lie with military prestige and fighting capacity. Broad knowledge, scientific training, and a farsighted vision are needed in order to develop a people able to accomplish any task placed before them. Democracy ultimately depends on that kind of training, and economic supremacy in the twentieth century will be attained by that state which spends its treasures most freely in the wise education of its citizens.

**International Aspects of Democracy.**—The influence of the modern spirit of democracy is well illustrated

in the broader national aspects of modern states. Ancient states, in their relations one to the other, were narrow and intolerant. They were suspicious of one another's motives, treacherous in their dealings and considered war to be their natural condition. Temporarily the Great War has plunged the nations into a situation not unlike that of former centuries and general distrust and hatred are only too evident. Yet after all civilization as a whole makes no backward steps. Since the development of the democratic spirit, international law and diplomacy have developed new attitudes of mind. Commercial needs and treaties necessitate joint agreements among states, which meet in international congresses, discuss matters of general interest, and agree on broad principles of policy. Joint action is taken whenever possible, rival interests are adjusted and harmonized by arbitration and mediation; wars are kept from spreading by careful diplomacy, and the stern terms of peace dictated by a conquering state must in the long run be modified so as to meet with the moral approval of disinterested states. Through the process of naturalization citizenship assumes a new form. By joint agreement of states a person now may withdraw from his parent state, forswear allegiance to it, and secure citizenship in the state of his choice. If in his new home he prefers to retain his natural citizenship, he will be as carefully safeguarded in his rights, though an alien, as any citizen of the land. This great privilege, when granted, is rapidly breaking down narrow racial barriers, as citizens of many states, and persons of different races, mingle in social and business life, exchange ideas, intermarry, and develop a cosmopolitan race and civilization that ultimately may banish the spirit of suspicion and war.

**Democracy in Domestic Policy.**—In their internal policy states where democracy prevails rely less on the clinched fist and more on the gray matter of the brain. Intelligence at home is a guaranty of success abroad. Service in consular and diplomatic administration increasingly depends on trained and proven capacity. The quality of the personnel of the civil service is steadily rising through administrative requirements; improvements in governmental machinery are eagerly sought and tried, and legislation is losing much of its former crudeness and is slowly becoming more scientific.

**Social Aspects of Democracy.**—The spirit of democracy also implies a kindlier and more sympathetic religion and higher standards in moral life. This is shown by the growing humanitarianism of religion, and the rise of numerous agencies for the alleviation and banishment of human suffering. The Red Cross organization with its broad international outlook, constructive as well as remedial, is an illustration of philanthropic trend. Criminal codes are becoming humane, cities are vigorously pushing the betterment of vicious conditions in social life, and labor organizations countenanced by the state are working earnestly for the social and economic improvement of their members. Intellectual development, freed from the incubus of dogmatism, has broadened out into an attempt to understand the whole of life, and through its achievements in science has made modern civilization progress by leaps and bounds. The spiritual and the æsthetic side of life has been deepened by a truer insight into ideals of harmony and beauty, derived from a wider experience and knowledge of physical and mental phenomena. Life for the average man in a democracy should become a happier, broader, and more generous

existence than that endured by his fathers. We realize now the futility of the old belief that goodness and wisdom are innate only in the privileged classes. By throwing open the opportunities and prizes of the world to all men, irrespective of birth, latent energy and capacity have come to the front. One needs but to investigate the pedigree of the greatest men of modern times to see that a few centuries ago the ancestors of such men were probably slaves and serfs. Had old-fashioned conditions persisted, the great achievers of modern civilization would in most cases be humble laborers on the estates of some robber baron. The real aim of social life after all is not to develop a small class of highly developed persons of special privileges, but rather to stimulate through the state the development of an energetic, intelligent, citizen body and high standards of social life.

It should be evident, therefore, that democracy is not merely a political system; it is a condition for human development, an ideal of social life, and a philosophic attitude of mind in regard to the larger interests of humanity as a whole. In its larger and truer aspects it implies the possibility of the attainment of higher civilization. In its political aspect it is merely the means whereby men attain real democracy; for the ballot in the hands of an intelligent electorate is an Aladdin's lamp, which, rightly used, will lay at its feet the social treasures of the world.

**The Trend Toward Democracy.**—No one is yet prepared to prophesy the outcome of the movement toward this humanitarian form of democracy. In quiet nooks of civilization, such as in the Scandinavian states and in Switzerland, in the "Farther West" of the United States, and on the fringes of civilization in Australasia, may be found the vanguard and fighting line of a newer

democracy. Casting precedent to the winds, the governments in these localities are pressing to a logical conclusion the teaching that all political power should be exercised directly by the people themselves. In these experimental laboratories they seem to be trying every conceivable political policy. The electorates are dictating the principles of the fundamental law and are working out startling policies of reform. By building up through careful investigation a scientific system of legal regulation, they hope to restrain the monopolistic tendencies of capital and to elevate standards of living for the "submerged tenth" and the "depressed classes." For these purposes the state does not hesitate, in one place or another, to authorize, as necessity demands, governmental ownership of lands, mines, waters, and the usual agencies for transportation; nor to embark in all sorts of business enterprises, even to the extent of lending money at low rates of interest to its citizens and serving as "middle man" for them in the disposal of their products. These regions seem more anxious to abolish pauperism and crime than to multiply millionaires; apparently they listen more readily to the demands of labor than to the allurements of capital, and, strangely enough, seem more interested in the health and education of children than in their exploitation in the industries.

Yet, after all, these commonwealths combined form but a petty fraction of human society, and on the face of it there seems no possibility that such iridescent visions of democracy can ever dominate the idealism of Western civilization as a whole. Progress as a rule goes on halting feet and with leaden step. And yet, if ever "young men see visions," there may come into their hearts an

enthusiasm for a newer civilization founded on justice and intelligence. Then these seemingly rash and well-nigh chimerical experiments in democracy may pass into history as the silver lining of the clouds that hid a brighter day for mankind.



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